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In the Supreme Court of the United States

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA, EX rel. John W. French, relator, *plaintiff in error*.
v.
JOHN W. WEEKS, SECRETARY OF WAR, defendant, *defendant in error*.
No. 724.

THE UNITED STATES OF AMERICA, EX rel. William F. Creary, relator, *plaintiff in error*,
v.
JOHN W. WEEKS, SECRETARY OF WAR, defendant, *defendant in error*.
No. 725.

BRIEF FOR THE SECRETARY OF WAR, DEFENDANT IN ERROR.

These causes have been advanced for argument because an authoritative interpretation of the requirements of the 1920 Army reorganization act is urgently needed by the War Department in its day-to-day work of administering that act.

STATEMENT OF THE CASE.

In the above-entitled actions the two relators were colonels of Infantry in the United States Army who, on the ground of unfitness, had been eliminated from the active list of the Army under the provisions of section 24b of the Army reorganization act of June 4, 1920 (41 Stat. 759, 773). Colonel French had been eliminated therefrom by being placed on the retired list; whereas Colonel Creary had been discharged. The present actions, instituted in the Supreme Court of the District of Columbia, were designed to obtain through mandamus restoration of these officers to their status before retirement and before discharge, respectively.

Little comment need be made upon the facts stated in the brief for plaintiffs in error.

That brief neglects to mention one very important fact. The relators, at the time of their elimination by the orders complained of, were serving in the grades to which restoration is sought by mandamus, in virtue of recess appointments. When the next session of the Senate came to an end March 4, 1921, no confirmations by the Senate and appointments by the President in virtue thereof had been had. Under the Constitution, therefore, there have been no offices since March 4, 1921, to which they could be restored.

In the following particulars, the facts stated by plaintiffs in error are misleading, rather than incorrect.

The records furnished to plaintiffs in error (Brief, pp. 6, 7) were those on which their provisional classifi-

cations had been based, as required by the statute (sentence 4, infra, p. 8). No contention can justly be made that relators had insufficient opportunity, through access to their records, to present cases in the courts of inquiry. Technical objection to the sufficiency of the records furnished was made in the petitions herein, but both of the lower courts have overruled the objection (Creary rec. pp. 27, 66) and no appropriate assignment of error has preserved the objection for consideration by this court. Further reference to any alleged defect in the furnishing of records seems, therefore, out of place and misleading.

The same comment applies equally to the references in the brief for plaintiffs in error to the fact that the record of the court of inquiry was not transmitted to the Judge Advocate General and to the assertion, in effect, that certain members of Colonel Creary's provisional classification board, final classification board, and "honest and faithful board" were prejudiced against him. (Brief, p. 9.)

The original defendant in both actions was Newton D. Baker, then Secretary of War, who, having been duly served with an order in the nature of process, in each case (French rec. p. 8; Creary rec. p. 6), filed answers. Demurrers by relators to the latter were argued together in February, 1921, and were sustained by the court March 12, 1921 (French rec. p. 22; Creary rec. p. 18). The present defendant in error who succeeded Mr. Baker as Secretary of War March 4, 1921, was not "brought into the case by petition or some other appropriate method" (*U. S. ex rel. Ber-*

nardin v. *Butterworth*, 169 U. S. 600, 605; *Irwin* v. *Webb*, Opinion, 20 March, 1922, by Chief Justice Taft), as might have been done under the act of February 8, 1899 (30 Stat. 822). Neither process nor notice or order in the nature of process was served upon him, as should have been done (*The Secretary* v. *U. S. ex rel. Mc.Garrahan*, 9 Wall. 298, 313). He did not waive process (*New Mexico ex rel. Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 442), or authorize a general appearance (Weeks' affidavit; French rec. p. 31; Creary rec. pp. 31, 32). On the contrary, in advance of "pleading to the merits" (*Harkness* v. *Hyde*, 98 U. S. 476, 479), Mr. Weeks appeared specially and asked for the right as a new party defendant to interpose his own answer (*Waters* v. *Central Trust Co.*, 126 Fed. 469, 471; *Fulton* v. *Ramsey*, 67 W. Va. 321, 325, 326). The trial court refused to accord the right thus asserted (French rec. pp. 38, 39; Creary rec. p. 40), and entered final judgments for the relators against Mr. Weeks upon relators' demurrers to Mr Baker's answers.

No argument is addressed to this court, however, predicated upon the refusal of the trial court to give Mr. Weeks his day in court. For any question in respect thereof is entirely overshadowed by other questions in these cases, the solution of which questions is absolutely vital to the administration of section 24b of the reorganization act. For the same reason, no argument is addressed to this court to show that the relators, who have in effect conceded their unfitness to remain in the Army (de-

murrer to art. 3 of French answer, rec. p. 9; demurrer to art. 2 of Creary answer, rec. pp. 7, 3), are in no position to attack through mandamus the proceedings whereby they were eliminated therefrom for unfitness.

U. S. ex rel. Turner v. *Fisher*, 222 U. S. 204, 209.

Payne v. *U. S. ex rel. Olson*, 50 App. D. C. 119, 122; 269 Fed. 198, 201.

The questions presented to the lower courts and the decisions made thereon by those courts.

By its judgments, the trial court ordered peremptory writs of mandamus to issue against John W. Weeks, the present Secretary of War, commanding him (1) to vacate the military order of November 17, 1920, by which William F. Creary was discharged from the Army of the United States, and to restore him to the office and status of colonel of Infantry therein (Creary rec. pp. 49, 50), and (2) to vacate the military order of December 24, 1920, by which John W. French was retired from active service in the United States Army, and to restore him to the office and status of colonel of Infantry on the active list (French rec. p. 52).

Both officers were regarded by Mr. Justice McCoy in his decision upon the demurrers (49 Wash. L. R. 339, 344: French rec. pp. 28–30; Creary rec. pp. 20–27) as entitled to restoration to their status before November 17, and December 24, 1920, respectively, upon the ground that personal consideration and approval of the proceedings by the

President of the United States were essential to effective orders of elimination, and that consideration and approval by the Secretary of War, upon express delegation to him by the President of his function in this regard, were ineffective for any purpose. It was also held by Mr. Justice McCoy (Creary rec. pp. 28–30) that Colonel Creary was entitled to redress, in so far as he had been discharged, instead of being merely retired, on the ground that the military board (commonly styled the "honest and faithful board"), which is charged with determining the issue of discharge or retirement, had accorded him no hearing.

Numerous other contentions put forward by the relators (French rec., pp. 20, 21; Creary rec., pp. 15–17) as establishing the invalidity of the military elimination proceedings were overruled by the trial court.

Upon appeal to the Court of Appeals of the District of Columbia, the judgments awarding writs of mandamus were reversed on the ground that neither relator was entitled to a writ (277 Fed. 594). The contested delegation of authority to the Secretary of War to do all necessary presidential acts in connection with the elimination of officers under section 24b was upheld as valid and effective; and the question whether Colonel Creary was entitled to a hearing before the honest and faithful board was held not to be determinable in an action of mandamus since the President, who, by the act of the Secretary of War, which was effectively performed for the President and became in law his act, had

approved the conclusion and determination of the honest and faithful board, is not subject to coercion through mandamus by any court. In the language of the Court of Appeals, the contention "that relator was not given notice of the hearing before the honest and faithful board * * * may be laid aside, since, in our view, the case turns upon a question of jurisdiction." (Opinion, Creary rec. p. 66, reported 277 Fed. 594, 597.)

The questions for consideration by this court.

The only contentions among those put forward below by plaintiffs in error, which by their assignments of error they have saved for consideration by this court, are that the Court of Appeals erred in not accepting, and basing its decision upon the two propositions of law *supra* which were adopted by the trial court.

The elimination statute in controversy.

The text of section 24b of the Army reorganization act was quoted in the opinion of the Court of Appeals (Creary rec., pp. 65, 66). Nevertheless, for convenience of reference, it may be useful to quote it in this brief. This section, which has not been construed in any former case, consists of eleven sentences, of which the last three have no possible bearing upon the questions at any time raised in these cases. The first eight sentences are as follows:

> SEC. 24b. *Classification of officers.*—1. Immediately upon the passage of this act, and in September of 1921 and every year thereafter,

the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A consisting of officers who should be retained in the service, and class B, of officers who should not be retained in the service.

2. Until otherwise finally classified all officers shall be regarded as belonging to class A, and shall be promoted according to the provisions of this act to fill any vacancies which may occur prior to such final classification.

3. No officer shall be finally classified in class B until he shall have been given an opportunity to appear before a court of inquiry.

4. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf.

5. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration, the finding of such classification board shall be final and not subject to further revision except upon the order of the President.

6. Whenever an officer is placed in class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct, or avoidable habits.

7. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of $2\frac{1}{2}$ per centum of his active pay multiplied by the number of complete years of commissioned service, or service

which under the provisions of this act is counted as its equivalent, unless his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay.

8. The maximum retired pay of an officer retired under the provisions of this section prior to January 1, 1924, shall be 75 per centum of his active pay, and of one retired on or after that date 60 per centum.

(Army reorganization act of June 4, 1920, 41 Stat. 759, 773.)

In dividing the text so as to make a separate paragraph of each sentence and in numbering each sentence, we have, of course, departed from the original, and have done so to facilitate references to the several parts of the statute.

It is clear from a perusal of the language of the act that it contemplates the following steps in the classification and in the retirement or discharge of an officer:

(1) *A preliminary classification board* (sentence 1, supra) examines the records of all officers of the Army and arranges them in two classes:

(A) Those who should be retained in the service; in a word, the fit.

(B) Those who should not be retained in the service; in a word, the unfit.

Should the officer in question be preliminarily classified in class B, then—

(2) If he requests it, *a court of inquiry* (sentences 3 and 4) affords him an opportunity to present his

case. The record of the court of inquiry is then forwarded to—

(3) *A final classification board* (sentence 5). If the latter board, after considering what has been proved and argued in the court of inquiry in conjunction with the officer's entire record, places him in class B, there shall then be assembled—

(4) *A board to determine the cause of classification* of the officer in class B (sentence 6), commonly referred to as the "honest and faithful board"; that is, a board to determine whether such classification was or was not due to his neglect, misconduct, or avoidable habits. This board, in discharging its functions, has, of course, the benefit of all previous proceedings, but it has never heretofore gone outside of them in reaching its conclusion. If it determines the foregoing question in the affirmative, the officer must be discharged from the Army; if in the negative, he must be placed on the retired list.

With reference to the fact that relators have brought their actions against the Secretary of War, the most significant feature to be noted upon a perusal of the statutory provisions, supra, is that they do not purport to impose any duty or responsibility upon the Secretary of War *virtute officii*,[1] who is not even mentioned in these provisions. Clearly the Secretary has no authority in the matter except in so far as, by the express or implied direction of the

[1] The phrase *virtute officii* is applied in this brief to acts done (rightfully or wrongfully) by an officer by reason of power or authority conferred *directly* upon the office held by him, by the Constitution or by a statute, and not by reason of power or authority conferred upon a superior officer and by the latter, entrusted or delegated to the officer in question.

President, given in conformity with R. S. 216, the Secretary acts for the President. With no showing, therefore, of any duty cast by law upon the Secretary and left by him unperformed, it was and is a mystery why relators have selected the Secretary of War as the party defendant in their actions of mandamus.

Another significant feature of these statutory provisions is that, aside from the duty of convening the preliminary classification board (sentence 1, supra), no duty is expressly cast upon the President, but, on the contrary, that in sentence 5, the statute purports to *diminish* what would otherwise be the primary responsibility of the President as Commander in Chief of the Army and as obligated to "take care that the laws be faithfully executed" (Constitution; sec. 2, clause 1, and sec. 3 of Art. II) by making the final classification board, primarily, the final arbiters as to the fitness or unfitness of Army officers to retain their offices. It is also to be noted that the language of sentence 5 does not support relators' idea (Brief, p. 13) that the statute expressly gives the President a power of revision. It merely empowers him to *order* a revision, which means a rehearing (by the final classification board).

Duane, Military Dictionary (1810), p. 600.
Wilhelm, Military Dictionary (1881), p. 487.
Farlow, Dic. of Mil. Terms (1918), p. 512.

Although the burdens to be borne by the presidential office are diminished by the last two lines of sentence 5, the power and authority of the President are not diminished, since his right to order a

revision of any officer's classification, whenever he sees fit, is recognized by necessary implication of its language.

The controversies between the parties litigant, as they appear in this court, are so far narrowed that the questions presented relate only to sentences 5 and 6, supra, and to the first three lines of sentence 7; the other portions of section 24b being relevant only as furnishing a context to aid in the work of interpretation.

In respect of these disputed sentences, the plaintiffs in error assert, and the defendant in error denies, that sentence 5, taken in conjunction with constitutional requirements and general legal principles, casts upon the President a personal, individual, nondelegable duty to study the proceedings relevant to the classification of every officer and to permit eliminations from the Army only after giving his approval of the proceedings consequent upon such personal consideration thereof. In the second place, the plaintiffs in error assert, and the defendant in error denies, that sentence 6 and the relevant part of sentence 7 obligates the honest and faithful board to accord to each officer a hearing before it, in addition to the hearing before the court of inquiry required by sentence 4 supra; the defendant in error also asserts that even were an officer unjustly deprived of a hearing before the honest and faithful board, his remedy is not by way of mandamus.

POINTS.

In urging that relators are not entitled to writs of mandamus and that the conclusion of the Court of Appeals is right, reliance is had primarily upon the grounds upon which the decision of that court was expresssly based. The following points in support of the same conclusion are also relied on:

1. The Army reorganization act requires no presidential act as a condition precedent to the elimination of an officer from the Army. Where the President does not see fit to act at all (personally or through his delegate or agent), the statute makes the findings of the final classification board and of the honest and faithful board final (expressly so, as to the former) upon all the issues incident to elimination. Therefore acceptance of relators' hypothesis of the invalidity of Secretary Baker's delegated authority would only involve denying the existence of any presidential act and would not invalidate the elimination of either officer, supported, as each elimination is, by the findings of both boards.

2. Upon the issue of the *cause* of classification (sentence 6 of the statute), Colonel Creary was not denied any hearing to which the statute entitled him, although he had no hearing in the presence of the honest and faithful board.

3. The offices to which restoration is sought were held in virtue of recess appointments and expired 4 March, 1921, at the end of the next session of the Senate; and it can not be assumed in an action of mandamus that (aside from the actual elimination

orders) they would have reverted to their previous offices held pursuant to nomination and confirmation.

4. Aside from other grounds, the removal of relators from their offices was valid as an exercise of presidential power, implied in his power of appointment to office or clearly granted in the 118th article of war.

I.

PERSONAL ACTION BY THE PRESIDENT IS NOT REQUIRED IN THE DOING OF ANY ACT INCIDENT TO THE RETIRING OR DISCHARGE OF AN OFFICER UNDER SECTION 24b.

This is true because (1) under section 24b, the President has a mere privilege or *option* of intervening, if he desires (sentence 5 of sec. 24b), the officers and boards whose *duty* it is to act being specified in the statute, viz, the classification boards and the honest and faithful board; and (2) were a presidential review or other presidential act required by section 24b, *personal* action by the President would not be necessary, for the reason (inter alia) that no judicial function is involved therein or in carrying into effect any of the purposes of the statute.

A.

PRINCIPLES TO BE APPLIED IN ASCERTAINING THE WILL OF CONGRESS AS TO WHETHER, IN THE ELIMINATION OF OFFICERS, ANY PRESIDENTIAL ACT IS REQUIRED AND, IF SO, WHETHER THE PRESIDENT MUST ACT PERSONALLY OR MAY ACT THROUGH THE SECRETARY OF WAR PURSUANT TO DELEGATED AUTHORITY.

In the administration of this officers' elimination statute, as of previous elimination statutes, the widest latitude, consistent with the statutory

language, should be accorded to those charged with responsibility for carrying the statute into effect. No presumption or intendment, therefore, should be indulged in favor of officers so as to retain them in office by adding to the safeguards and means of protection which Congress has expressly provided for them other safeguards and means of protection not expressly provided. This is true for two reasons: (1) The purpose of Congress in section 24b to save the country the expense of maintaining officers whose services do not measure up to the standard, which Congress has indisputably intrusted to the military authorities to fix, is one which should be promoted, not hampered, by the courts. The courts should not, therefore, interpose obstacles to eliminations ordered by the War Department, especially obstacles not known to former military practice, unless it is shown both *affirmatively and clearly* that the interposition of these obstacles is authorized by Congress. (2) An Army officer has no personal claim upon his office. He holds it, in theory, only because, and so long as it is advantageous to his country that he should do so.

These propositions are deemed too well settled to justify reference to more than a few of the available authorities.

1. In the war through which the world has recently passed, just as in the Civil War of 1861–1865, Army officers were desperately needed; so that almost every man who could become in any degree helpful to his country by undertaking the duties of an Army

officer, was called into the service as such. Manifestly, a situation of the opposite character arose when peace succeeded. The statutes passed after each of these wars for the elimination of surplus officers or of officers not measuring up to the new and higher peace-time standard of fitness are therefore to be construed by applying to such acts similar reasoning and similar principles. This is none the less true because the reorganization act of 1920 contemplates an annual weeding out, whereas the analogous act of July 15, 1870 (16 Stat. 315, 318), provided for a continuous process of weeding out and fixed a time limit for the completion of the process.

In *Street* v. *U. S.* (24 Ct. Cls. 230, 133 U. S. 299) it was held, in substance, that the elimination act of 1870, supra, must be given a liberal interpretation; not reading into it any procedural or other restrictions or requirements not plainly imposed by Congress and not treating the results as invalid, even where such requirements were wrongfully disregarded, unless the congressional purpose to make the requirements in question *conditions precedent* to valid eliminations were clearly expressed.

Lieutenant Street, who had been mustered out in virtue of the elimination act of 1870, supra, sued for pay on the theory that the order mustering him out was invalid. The statute required that officers, mustered out without being accorded a hearing on the issue of fitness, must have been placed on the supernumerary list by January 1, 1871; whereas Lieuten-

ant Street, who had no hearing, was so placed January 2, 1871.

In a preliminary statement of facts and principles, before proceeding to hold that noncompliance with the statutory requirement did not in that case vitiate the result, Mr. Justice Brewer, speaking for this court, said:

> "In 1869 and 1870, acts of Congress were passed looking to a reduction in the Army, and the order in question was made in pursuance of the last of these acts. The intent of Congress is obvious, and all proceedings had to carry such intent into effect should be *liberally construed*,[1] and not subjected to any such technical limitations as will thwart such obvious purpose."
>
> *Street* v. *U. S.*, 133 U. S. 299, 300.

Not only because of facilitating the attainment of the main congressional purpose in the present statute (the elimination of the unfit) should the court refrain from interposing obstacles not clearly sanctioned by Congress, but also because it must be assumed that Congress has not intended to burden the War Department with *new* limitations and restrictions, as compared with the methods previously in use, unless

[1] Quoted language is freely italicized throughout this brief in order to direct attention to the relation of ideas between the argument of the brief and the thought of the quoted authority. Each quoted passage is, therefore, to be read as if it were followed by the explanation: "Italics are those of the author of this brief." Phrases are also occasionally inserted in quoted passages throughout this brief, in order to make the meaning clear without having instant recourse to the full text of the original. Such inserted phrases are distinguished from the quoted language by not being within quotation marks, and this fact is further emphasized by using parentheses.

Congress has declared its will affirmatively and unequivocally to that effect.

The discharge and retirement of officers have, indeed, always been by presidential authority and orders of discharge or retirement have usually recited "By direction of the President." But it is a fact that is perfectly familiar to this court and to the community that the personal consideration of individual cases (other that those involving court-martial convictions) by the President has never been deemed essential to the validity of such orders and has seldom been had. The authority of the President is exercised in the true sense, when he authorizes the Secretary of War to order discharges and retirements in his name; and a discharge or retirement is by his "direction," in the true sense, when he directs that any who may have been selected for discharge or retirement by the Secretary of War, or who may thereafter be so selected, shall be discharged or retired as the case may be.

The well-established practice under which discharges and retirements are regularly accomplished without personal attention by the President, although in orders of discharge and of retirement recitals are used to the effect just stated, is doubtless a fact of which this court is entitled to take judicial notice. It is also sufficiently indicated by the record before this court (Exh. 1 and 2 to Creary ans., rec. p. 12; French petition, art. 7, rec. p. 4; Exh. 6 and 7 to French ans., rec. p. 20), for it can not be assumed that the highest officers of the Army and of the War

Department would order discharges and retirements expressly "by direction of the President," as they are shown to have done, in cases in which, according to the pleadings, there was no presidential consideration of the individual records; unless, indeed, the custom of the service sanctioned discharges and retirements without personal consideration by the President of individual cases and sanctioned the use of the phrase "by direction of the President" to denote compliance with the system of distribution of duties and responsibilities, which system had been directed by the President. The established practice should be weight by the courts (infra, p. 103).

2. Public offices are trusts for the benefit of the State or Nation, but the incumbents thereof have no contract right or property right to be continued therein. They have, therefore, no standing to object to arbitrary removal by the proper authority.

Butler v. *Pennsylvania*, 10 How. 402, 416.
Newton v. *Com. of Mahoning Co.*, 100 U. S. 548, 559, and cases cited therein.
Taylor v. *Beckham*, 178 U. S. 548, 577.
Wilson v. *North Carolina*, 169 U. S. 586.
Boyd v. *Nebraska*, 143 U. S. 135.

This proposition applies *a multo fortiori* to Army officers.

Blake v. *United States*, 103 U. S. 227, 232.
Crenshaw v. *United States*, 134 U. S. 99, 104, 105, 108.

whose tenure of office is "among the frailest known to the law."

Street v. *United States*, 24 Ct. Cls. 230, 247.

Officeholders are not protected, therefore, against arbitrary removal by the "due process" clause of the Constitution.

It is true that officers are entitled before elimination to "due process of law" in a general sense, but not in the constitutional sense. That is, they are entitled to the benefit of those proceedings only which the statute has actually created for them. It was in this sense only that Mr. Justice McKenna, speaking for this court in *Reaves* v. *Ainsworth* (219 U. S. 296, 299), said of the act of October 1, 1890 (26 Stat. 562), for the promotion or elimination of officers: "*This statute constitutes the law of the case.*"

Mr. Justice McKenna also said in the same case:

> "To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army. And this was the motive of the act of October 1, 1890, and naturally its accomplishment was intrusted to the President. He executed the trust by constituting examining boards, defining their duty and *reserving to himself the ultimate review* of their proceedings and decision. This is the protection which the act of Congress gives to the rights conferred by it. If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board, * * * such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined."
>
> *Reaves* v. *Ainsworth*, 219 U. S. 296, 306.

The promotion-or-retirement act of October 1, 1890, was manifestly *in pari materia* with section 24b of the reorganization act of June 4, 1920, although the latter statute differs from the former in not expressly intrusting its accomplishment to the President. The reasoning in *Reaves* v. *Ainsworth* is therefore important. According to its reasoning, the ultimate decision of whether an officer should be discharged under the 1890 act was reserved to the President because, and *only because* the President, by orders having the force of law, expressly reserved to himself the function of final review. The same reasoning applied to the present case would involve our saying that since Congress has not expressly cast upon the President the duty of final review, and he has not by competent order assumed it, the courts are not justified in charging him with that duty by implication. To do so would be for them to assume to "regulate the Army" (219 U. S. at 306).

B.

THE PRESENT OFFICERS' ELIMINATION STATUTE DOES NOT PURPORT TO REQUIRE, AND DOES NOT REQUIRE, ANY ACT UNDER PRESIDENTIAL AUTHORITY, BEYOND THE APPOINTMENT OF THE PROVISIONAL CLASSIFICATION BOARD.

1. In the elimination section of the reorganization act, there is no mention of or reference to the President in connection with the discharge or retirement of officers (sentence 7) or in any other part of the section, except in sentences 1 and 6. Sentence 1 requires the President to convene a preliminary

classification board annually. The pertinent part of sentence 6 is as follows:

> "The finding of said" [final] "classification board *shall be final* and not subject to further revision, except upon the order of the President."

Manifestly, in using this language, Congress is not *exacting* from the President or from any one exercising, by delegation, the President's authority any order on the subject of revision. It is merely *empowering* him to order a revision, if he shall think fit.

Probably the principal purpose in expressly making the board's classification final was to preclude urgent requests *addressed to the board* by officers, asking the board to reopen their cases and grant a "revision"; whereas the last seven quoted words were doubtless added to make it clear that the authority of the board, in respect of classification, were not intended to be superior to the President's.

Why is there a statutory declaration that the finding of the board shall be *final,* unless Congress contemplated that there would be cases not governed by the *exception* contained in the last seven words of the sentence quoted above, in which cases (not so governed) the finding of the board would actually be final? Incredible as it may seem, the trial court was persuaded to hold that the meaning of this simple language is the same as if its words had been:

> The finding of said classification board *shall never be final.* In every case, it shall be reviewed by the President, who may approve and adopt said finding; but if, upon such

review, he deems such finding to be erroneous or to be founded upon insufficient investigation, he may order further revision.

Had this been the wording of the statute (instead of the contrary wording actually used by Congress), it would have presented a question as to the right of delegation similar to that which, in some future case, may actually be presented with reference to sentence 1, to wit: Does the President discharge his duty under the statute by prescribing the method, and choosing the persons who are to perform the acts commanded by the statute and by assuming the responsibility for the result; in other words, may he delegate the doing of the particular acts required by individual cases?

But *the actual wording* of the statute *raises no such question*, since it does not purport to require the doing of any act, either by the President or for which he is made responsible by its terms, except only the act of convening a preliminary classification board. As to this act, no question is raised in the present case; for the petitions do not assert that the President delegated to some one else the duty of convening this board and there is no contention that he could not effectively have delegated this duty, if he had seen fit to do so.

Congress has *unambiguously* created a situation in which the finding of the final classification board, according to the congressional intent, is to be final *at least sometimes;* and it can not reasonably be supposed that Congress would describe such a finding as *final*, if such finding invariably required confirma-

tion or adoption, by the ratification or approval of the President, in order to give to such finding either finality or vitality or effect.

The relators persuaded the trial judge (Opin., Creary rec., p. 22) to infer from the pleadings that the President never permitted the findings of the board to become final, but always required a review thereof; and relators make the same contention here (Brief, p. 13, bottom). Were they right, that fact would not serve to vary the intent of Congress, which was to cast no duty of review upon the President, but only to recognize his right to intervene, by ordering a revision. But the trial judge and the relators are wrong. The pertinent allegations are:

> (Defendant) "received from the President then and there a general authority and direction that he, as Secretary of War, should in all such cases take such action in the name of the President and by his authority, by way of approval, revision, *or otherwise*, as from the circumstances shown by the record in each such case appeared to him to be right and proper." (Baker ans.: Creary rec., p. 9; French rec., p. 12.)

This was no more than saying that whatever the President would have had the right and the power to do, with reference to elimination proceedings, he desired to have the Secretary of War to do for him, and that in what the Secretary should do or should omit to do, he was to use his own judgment. What the Secretary was to do was by no means limited to approving, on the one hand, and ordering revisions,

on the other hand. For the word "otherwise" is broad enough to include any other course, with reference to any particular case of elimination, which course, to the Secretary of War, might appear to be right and proper; and, naturally, one of the courses which the Secretary was thus authorized to adopt, if he saw fit, was to refuse to review the proceeding.

The opportunities which a Secretary of War has to acquire information concerning the merits of Army officers are such that, aside from any formal proceedings for elimination, he may occasionally and, perhaps, often know that it would not serve any useful purpose for him to read the proceedings or to review them; in which event it would surely be "right and proper" under the plan of procedure directed by the President for the Secretary to refuse to review the finding of the classification board which, subject to one exception (that of the President's affirmative intervention in any particular case), the statute made final. Whether Secretary Baker, in his desire to avoid even the *possibility* of injustice, actually went beyond his duty and reviewed every case, the record before this court does not show, nor would it be material, legally, if such were the fact. All that the record shows is that the elimination proceedings were reviewed by the Secretary of War in the Creary and French cases.

2. But the trial judge seemed to regard the President as under a duty to examine the elimination proceedings *personally*, as incident to the option of

ordering a revision conferred upon him. The trial judge said:

> "If it is optional with the President to order a revision of the proceedings either directly or through the Secretary, certainly they must be called to his attention so that he may exercise his option, as *an option implies an opportunity*." (Creary rec., p. 22.)

But the alleged fact that the record of the court of inquiry and of the final classification board was not transmitted to, or considered by the President personally (Creary petition, pp. 4, 5; French petition, p. 6), assuming such allegations to be true, would afford no indication that the President was denied an essential opportunity to exercise his statutory option. The grant of power to order a revision may imply a duty to take proper steps to secure suitable opportunity for exercising the power, but it was for the President to say what opportunity would be of value to him. There is no allegation indicating that the opportunity properly desired by the President was not actually enjoyed by him.

To hold that the President is without discretion to determine the sort of opportunity with which he must equip himself in order to exercise the powers and options which statutes confer upon him and to hold, as a matter of law, that in elimination cases, the only opportunity, consistent with his duties, is that which is afforded by *personally* reading the records of classification proceedings, would be analogous to holding that the conferring upon the President of the power to pardon Federal prisoners makes

it his duty to examine personally the records of the criminal trials of all the Federal prisoners.

In the absence of any allegation as to what system, other than that of his personally examining all records of elimination proceedings, the President caused to be established in order to enjoy due opportunity for the exercise of the statutory option, conferred by section 24b, there is a *presumption* that the President caused a proper system to be established and caused it to be followed and carried out and that he and other public officers performed all the acts required by that system.

U. S. v. *Crusell*, 14 Wall. 1.
Ross v. *Stewart*, 227 U. S. 530, 535.
Erhardt v. *Ballin*, 150 Fed. 529, 531.
Wells Fargo & Co. v. *Johnson*, 205 Fed. 60, 77.
May v. *U. S.*, 236 Fed. 495, 499, 500.

Aside from any presumption, the facts, as they would have been proved, if necessary, by Mr. Baker (affidavit, par. 3: Creary rec., p. 42; French rec., p. 41) and as Mr. Weeks strove in vain to show by pleading (Weeks's proposed answers: Creary rec., pp. 36, 37; French rec., p. 36), were as follows, reasonable inferences from the proposed answers being (for the sake of brevity and clearness) stated as facts: The President decided, in effect, that it would be impossible for him to consider personally the merits of all the classification proceedings so as to decide whether in any of them, and in which of them, he would order a revision; that he could only undertake to consider

personally some of them (indeed, only a few of them); that if he were to attempt personally to separate the cases meriting his personal review and his personal decision upon the question of ordering a revision from the cases not meriting such personal review and decision, his labors would not be appreciably lightened, as compared with his reviewing personally all of the cases, and that this work of separation must, therefore, be done for him.

He accordingly directed the Secretary of War to do this work and to bring to the President's attention for personal consideration by him such cases as, in the Secretary's opinion, merited such personal consideration; and the President directed that in this work of separation of cases, the Secretary was to be influenced primarily by the importance of the cases, but also by any other circumstance which the Secretary regarded as entitled to influence. Under this system and under these directions, the President had what were for him the best facilities possible and the best opportunity possible (as a practical matter for a human being who lives only twenty-four hours per diem) to exercise the power conferred upon him by Congress to order revisions of classifications in class B. The Secretary of War performed his duty under this system and, in so doing, "concluded" "after due consideration" that relators' cases "did not, by reason of" their "importance or for any other reason, merit the personal attention and consideration of the President." (Weeks's answers, *supra*.)

3. Under section 24b, there are two steps incident to elimination, each involving a separate determination, to wit: (1) Determining whether an officer is fit

or unfit; i. e., classifying him in class A or class B, and (2) determining, as to each officer found unfit, the cause of unfitness; determining whether he must be discharged or is entitled to retirement.

The second determination is committed by statute to the honest and faithful board. Its determination is, no doubt, impliedly left subject to presidential control, but in the absence of action by or on behalf of the President, it seems entirely clear from the statutory language that the action of the honest and faithful board upon the issue of discharge or retirement is sufficient. The statutory language is to the effect the honest and faithful board shall "determine whether such classification" (in class B) "is due to his neglect, misconduct, or avoidable habits. If the finding is affirmative, he" (the officer so classified) "shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list," etc. (sentences 6 and 7, supra, p. 8).

There is room to argue from this language that a review of the work of the honest and faithful board by or on behalf of the President is *permitted* by the statute; but there seems to be no room to argue that such review is *required* thereby, the President being not even mentioned in this connection.

C.

IF A PRESIDENTIAL REVIEW OF ANY OR ALL OF THE ELIMINATION PROCEEDINGS WAS REQUIRED, SUCH REVIEW WAS IN FACT HAD. THE COURT OF APPEALS WAS RIGHT IN SUSTAINING AS VALID PRESIDENT WILSON'S DELEGATION OF AUTHORITY TO SECRETARY BAKER.

With great respect to the two lower courts, both of which apparently regarded these cases as turning

primarily upon the delegability of the President's power to review and approve elimination proceedings, it is submitted that the elimination of the two relators was valid and effective, irrespective of the view that may be entertained upon this point. This is true because (as pointed out in heading "B," supra), the statute authorizes eliminations without any action whatever by or on behalf of the President; and because, if he omit to act, action by the final classification board and by the honest and faithful board are made sufficient.

Subject to objection by Colonel Creary, based on his having had no separate hearing before the honest and faithful board, relators in effect concede in this court that the two boards mentioned acted regularly and effectively in the elimination of both relators, assuming that these boards were competent to act without approval by presidential authority.

(a) The decisions below in respect of delegation of the President's authority.

In the multiplicity of the duties of the President, duties which statutes have cast upon him expressly as well as impliedly, his right to delegate these duties to others has been regularly recognized from very early times; *ex necessitate rei*, it could not have been otherwise. In no class of cases, so far as the industry of relators' counsel has discovered, has the rule of delegability of presidential duties been properly or successfully denied, except when the President exercises his confirmatory powers in respect of sentences of courts-martial (A. W. 65; 2

Stat. 367: now represented by A. W. 48; 41 Stat. 796). *Runkle* v. *U. S.*, 122 U. S. 543. The analogy between such action and other presidential action seems very remote, however, when it is borne in mind that in legal theory, the President, when he acts upon a court-martial case, becomes a judge, i. e., a member of the court-martial itself (infra, pp. 48, 50).

1. The Court of Appeals rightly regarded the rule in *Runkle* v. *U. S.* as inapplicable here on two fundamental grounds: (a) That the statutory language applicable to courts-martial is so specific as to indicate an intent that, in presidential cases, the President shall act personally and not through delegation; whereas the officers' elimination statute contains no language implying any such intent, and (b) that action upon court-martial records is judicial; whereas action upon elimination records is purely administrative.

The Court of Appeals pointed out (Opinion, Creary rec., p. 67) that in the Runkle case, "the statute expressly provided that no sentence of a general court-martial" (in presidential cases) "shall * * * be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval." The express statutory reference to the Secretary of War was enough to indicate a legislative intent that he was to act as intermediary or adviser to the President, but was not to act as a substitute for the President's acting personally.

The Court of Appeals evidently entertained no doubt of the purely administrative character of the work of reviewing records of elimination proceedings. It announced its view in the following language (Creary, rec. pp. 67, 68):

> The proceedings are purely administrative, and do not partake in any sense of a judicial character. Relator has no property right in the office to which he seeks reinstatement (*Taylor and Marshall* v. *Beckham*, 178 U. S. 548); no contract right is involved (*Butler* v. *Pennsylvania*, 10 How. 402); and the office he held was revocable by the sovereignty at will (*Crenshaw* v. *United States*, 134 U. S. 99). In other words, the relator's rights are measured by the statute. *Reaves* v. *Ainsworth*, 219 U. S. 296; *Ex parte Garland*, 4 Wall. 333, 378.

2. The trial judge, after indulging, without explanation, the assumption that a review of elimination proceedings by presidential authority is essential to the validity of discharge or retirement, and without noticing the difference of language between the court-martial statute and the officers' elimination statute, held that such review is a judicial act for three reasons. (*a*) He construed the doctrine of this court in the Runkle case as being "that the act of reviewing was judicial in its character not solely because the proceeding was judicial, but because the act of reviewing the findings of others based on evidence is essentially a judicial act" (Creary rec., p. 23). (*b*) He deemed elimination proceedings, equally with court-martial trials, as judicial

because "in both a hearing is had and evidence is considered. In both, facts are found—in court-martial proceedings, guilt or innocence; in proceedings like the present, fitness or unfitness" (Creary rec. p. 24). (*c*) The trial judge thought that he found in section 5 of the same reorganization act an instance of expressly authorized delegation of presidential duties and he inferred that Congress did not intend to authorize other delegations of duties. One of the difficulties which preclude an acceptance of the third of his reasons is that the instance referred to is not one of delegation; for the statutory requirement that "the Chief of Staff * * * under the direction of the President or of the Secretary of War under the direction of the President, shall cause to be made * * * the necessary plans for recruiting, organizing, supplying," etc. (sec. 5; 41 Stat. 759, 764), is one that does not permit the President to act personally, if he choose, or to select any proper agent to act for him—as, for instance, the Secretary of War, the Assistant Secretary of War, or The Adjutant General—in the matter of causing necessary plans to be made. No presidential delegation is authorized by this section of the act because the primary responsibility of causing plans to be made is, in effect, declared not to be presidential at all. The only legislative purpose in mentioning the President is manifestly to make it clear *ex majore cautela* that the Chief of Staff, in the function specified, is not intended to be superior to the control of the President. The like caution was shown by

Congress in sentence 5 of section 24b (supra, p. 8); although less caution was shown in sentence 6 and the first three lines of sentence 7 of section 24b (supra, p. 8).

3. There appears to be equally slight support for the view of the trial judge that presidential action upon records of elimination proceedings is judicial, either because the President or his agent would be reviewing the findings of others (*Shoemaker* v. *U. S.*, infra), or because such findings were based upon hearings or upon a consideration of evidence (*Donahue* v. *County of Will*, 100 Ill. 94, 108).

It is true that in the case of *In re Guden* (171 N. Y. 529; 64 N. E. 451, 454), Judge O'Brien expressed the view that if a sheriff is entitled, before removal, to a hearing, the proceeding must be deemed a judicial inquiry. The six other judges, who with Judge O'Brien composed the court, *disagreed* with him, however; and in a similar case, that of *Kennedy* v. *Brady* (166 N. Y. 44; 59 N. E. 701), the entire court, including Judge O'Brien, agreed that a removal proceeding is at least *not* so *completely judicial* as to be reviewable by certiorari.

The basic principle that, in distinguishing between (1) political or executive acts involving discretion, (2) quasi-judicial acts of administrative officers and (3) quasi-legislative acts of administrative officers, the criterion is the nature of the final or effective act rather than the procedure followed, or the safeguards resorted to in order to prevent erroneous or mistaken action, such as hear-

ings, evidence, cross-examination of witnesses and preliminary recommendations or determinations with reviews thereof, was well stated by Judge Ray in *D., L. & W. Railroad* v. *Stevens*, 172 Fed. 595, 607, a case in which it was unsuccessfully contended that the action of the Public Service Commission of New York in regulating railway operation was quasi-judicial and therefore subject to correction on certiorari. Judge Ray said:

> "I am not prepared, as at present advised, to concur in any holding that a commission is a judicial or quasi-judicial body, or that it acts judicially and not legislatively, for the reason it hears evidence, considers, exercises its best judgment, and then decides what order it will make." *Delaware, L. & W. R. Co.* v. *Stevens*, 172 Fed. 595, 607.

The controlling principle was found by Judge Ray in a sentence of Mr. Justice Holmes that "the nature of the final act determines the nature of the previous inquiry." *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 227.

In *Butterworth* v. *Hoe*, 112 U. S. 50, 56, 59, and in *Wedderburn* v. *Bliss*, 12 App. D. C. 485, 495, both cases involving successive reviews of determinations in the Patent Office, the quasi-judicial character of *all* of the determinations was recognized; as well determinations in the first instance as upon review.

Under the principle declared in the *Prentis* case, supra, it is manifest that the following proceedings, investigations, or determinations would not become judicial or quasi judicial, because of sworn evidence

being adduced before a body charged with ascertaining facts or because of interested persons being permitted to call witnesses and cross-examine others and enjoy privileges somewhat resembling those of a party litigant or because of the proceeding having reached the reviewing stage or that of final determination by the officer or body bearing the ultimate responsibility for the decision, either with or without the assistance of a recommendation or preliminary determination by inferior authority: (1) a proceeding to facilitate an intelligent congressional decision upon war or peace; (2) a proceeding to aid the President in deciding whether to recognize a foreign government, as, for instance, the Obregon Government in Mexico or the Soviet Government in Russia or whether to annex, under the act of Aug. 18, 1856 (11 Stat. 119, see *Jones* v. *U. S.*, 137 U. S. 202, 217), a guano island, which an interested American might claim to have discovered and to have found unoccupied by foreign nationals; or (3) a proceeding to aid the Secretary of War in deciding whether to deepen or improve a particular waterway (assuming that it were discretionary under the pertinent statute) or to erect a fort in proximity to a particular city.

The essential reasoning of the trial court would seem to be wholly invalidated, however, by the doctrine unanimously adopted by this court in *Shoemaker* v. *U. S.*, 147 U. S. 282, 301. In proceedings for the acquisition of land for Rock Creek Park, three appraisers appointed by the Supreme Court of the District, conformably with statute, took evi-

dence concerning the value of the land, heard arguments for the Government and for the owners of the land, and assessed the value thereof. The President of the United States was required by statute to review their valuation, his approval of the value being made a condition precedent to payment out of public funds. The contention of the landowners was that the function of the President was essentially judicial and that only a court could properly "review the evidence and proceedings before the appraisers * * * and decide whether the values fixed by them afforded just compensation." (147 U. S. at 293.) The lower court decided in effect, however, that (although, no doubt, the functions of the *appraisers* were judicial) the functions of the *President* in reviewing the proceedings and conclusions of the appraisers were not judicial, since the President had "no power to take the property in disregard of their assessment" (147 U. S. at 289). That the appraisers acted judicially and the President administratively presents no anomaly, since the appraisers' action (inter alia) was incident to compelling the landowners to take a just price; whereas the President's review was limited to a different feature of the appraisers' functions. This decision was affirmed. Mr. Justice Shiras, speaking for this court, said:

> "The duties prescribed to the President are * * * the approval of the price to be given for lands where an agreement has been had between the owners and the" (park) "commission, and, if an agreement is not made and a value is put upon lands by appraisers ap-

> pointed under the act, the decision whether such value is reasonable * * *. The approval of the value or price, whether fixed by agreement or appraisal, can not be said to be a judicial act. What the President decides is not whether the value is reasonable as respects the property owner, but reasonable as regards the United States."
>
> *Shoemaker* v. *U. S.*, 147 U. S. 282, 301.

It is clear, then, that neither a voluntarily conducted hearing upon evidence, nor one compulsorily conducted in virtue of a legislative or other mandate, gives to the proceeding, of itself, a judicial or quasi judicial character, and that the review of such proceeding, if conducted for the same purpose as the proceeding reviewed, partakes of the same character as that proceeding.

Contrary to the contentions of plaintiffs in error (Brief, p. 18), a ruling that Col. Creary was entitled to a hearing before the honest and faithful board would not amount to holding that its proceedings were judicial in character, even if any such ruling had been made. (See supra, pp. 34–36.)

(b) That presidential functions are delegable is the well-nigh universal rule. The Runkle decision turned upon exceptional statutory language, fundamentally unlike that in section 24b.

Statutes, like section 24b, are practical directions given by practical men concerning the working of an actual governmental machine with which the legislators are familiar; and they should be construed in the light of that fact. It may always be safely as-

sumed that the legislators did not intend to require the impossible. It may also be assumed that Congress is fully aware of the fact that it is physically impossible for the President personally to do all the acts that are required of him in statutes in which he is expressly named and in which he is required to act. The irresistible inference is that Congress has intended that the President, in such cases, should choose agents to act for him; that he should delegate to them the power and duty of doing the act required, either generally with reference to all acts of the nature in question, or with reference to particular cases or instances in which action is known to be required; and that the acts thus done by the President's agents should be add become, within the meaning of the statute, the President's acts.

The general principle is, therefore, that the President may delegate the doing of all acts required of him, even by statutes in which he is expressly named as the person to do the act; and that personal action by him is not required unless the statute makes it unmistakably clear that what is required is *personal* action by the President.

The only exception to the regular rule of delegability, which has been recognized, is one which relates to a statute wherein the legislative intent that personal action by the President is required was indicated by the express statutory mandate that the proceedings to be acted on by presidential authority should be transmitted to the Secretary of War and that he should lay them, or cause them to be laid,

No effort, therefore, will be made to show what the word ought to mean with reference to some other problem than that of the delegation of presidential powers. Nor will any effort be made to show, in general, what statutory duties an executive officer, other than the President, may delegate. For it is clear that if Congress requires the doing of an act by (let us say) the Chief of the Air Service, the statutory words might properly be regarded as requiring personal action; whereas the same words in a statute requiring action by the President might properly be regarded as permitting delegation of the duty to perform the act.

Indeed, delegation of the President's powers to the head of the appropriate department is *presumed* in the absence of evidence to the contrary; whereas no one inferior in rank to the head of the department enjoys, in general or as a matter of course, the presumption of a delegation of the powers of his superior.

This distinction was recognized by Judge Rudkin in *Northern Pac. Ry.* v. *Mitchell,* an action in ejectment brought by the railway. Its title to the disputed lands depended upon whether its filing of a map had been anticipated by presidential action reserving such lands. Acts of the Indian inspector and of the Indian Commissioner and of General Howard in giving effect thereto by force were relied on as amounting to presidential action. Subsequent to the filing of the map, President Hayes ratified these acts and formally set aside these lands. Plaintiff's title was nevertheless held good. Judge Rudkin saying:

"It is also well settled that the President may act through the heads of the different departments; and if the head of one of the executive departments acts, it will be presumed, in the absence of evidence to the contrary, that he acted" [through authority delegated to him] "by direction of the President. Wilcox *v.* Jackson, 13 Pet. 513; Scott *v.* Carew, 196 U. S. 100. But so far as I am advised, *no such power* has been *delegated to* other *subordinate officers* of the government, whether civil or military and" [there being no presumption of delegation] "the acts of such officers, without authorization from the President or from Congress, are ineffectual for any purpose * * *. Although the court will presume that the head of a department acts by direction of the President, in the absence of evidence to the contrary, this presumption does not extend down the line to all civil and military officers of the Government of whatever grade."

Northern Pac. Ry. v. *Mitchell*, 208 Fed. 469, 472, 473.

2. In considering what acts of the President may be deemed "judicial in character," it may be advantageous to classify the acts and determinations of administrative officers with reference to their inherent nature before considering the context of the opinion in the *Runkle case* and other authorities on what presidential acts are properly regarded as judicial and on what functions are delegable.

It is suggested that the acts and determinations of executive officers are divisible into the following classes:

(1) Purely *ministerial acts* which involve neither judgment nor discretion. These acts, in a proper case, may be coerced by mandamus. They are not judicial in any sense.

(2) Acts and determinations of administrative officers that differ from the former *only* because they involve *judgment or discretion*. By an unfortunate use of language, these acts have been occasionally referred to as judicial. To call them administrative acts would not be entirely appropriate, since administrative acts are often spoken of as including purely ministerial acts (the previous class). To distinguish them from the latter, this court has sometimes referred to acts involving judgment or discretion as *political acts* or executive acts.

> *Marbury* v. *Madison*, 1 Cranch, 137, 165, 166.
> *Twenty Per Cent Cases*, 13 Wall. 568, 575.
> *Kendall* v. *United States*, 12 Pet. 522, 609.
> *Decatur* v. *Paulding*, 14 Pet. 496, 515.
> *Mississippi* v. *Johnson*, 4 Wall. 475, 499.

(3) Administrative determinations which award, or take away, asserted rights of liberty or of property (*Craig* v. *Leitensdorfer*, 123 U. S. 189, 205), in doing which, notice to the persons affected and a hearing are, in general, constitutionally essential (*Chicago, &c. Railway* v. *Minnesota*, 134 U. S. 418, 457). The hearings, however, are not adversary proceedings in any proper sense; there is no public prosecutor nor any representative of the public

charged with opposing the asserted private right. The only public officers concerned are those who are charged with the making of a just and proper decision. These determinations are conclusive against collateral attack (*Central Trust* v. *Central Trust*, 216 U. S. 251, 261); but, not being *res judicata*, they are subject to modification by the same, or by superior administrative authority, unless otherwise provided by statute.

Pearson v. *Williams*, 202 U. S. 281, 285.
Johnson v. *Payne*, 253 U. S. 209.
Boynton v. *Blaine*, 139 U. S. 306, 325.
Garfield v. *Turner*, 31 App. D. C. 332.

Determinations of this class are appropriately referred to as *quasi judicial*.

(4) Determinations which, in their fundamental or essential features, are identical with the decisions, judgments, or decrees of courts constitutionally exercising the judicial power of the United States. They are consequent upon an adversary proceeding, in which there are *actor*, *reus*, and *judex*. Determinations of this class, when expressed in their final form, are so formulated by, or by direction of, the deciding officer or body as to be adapted to be carried into execution; they are determinations affecting life, liberty, or property; they have the force of *res judicata;* and the officer or body making such determinations is supported by an executive agency whose duty it is unquestioningly to carry such decisions into execution, unless prevented by action in the nature of appeal or pardon. Acts or determinations of this sort are accurately described as *entirely judicial in character*.

Determinations by the Interstate Commerce Commission are, therefore, not to be deemed *entirely* judicial in character (fourth class, supra), although proceedings before that body are very formal and technical (*Humboldt S. S. Co.* v. *Interstate Commerce Com.*, 37 App. D. C. 266, 277; *Louis. & Nash. R. R.* v. *Finn*, 235 U. S. 601, 606); whereas determinations by the Interior Department's "court of Indian offenses," which are not in writing and are reached by most informal methods, may possibly lay claim to being entirely judicial in character (*United States* v. *Clapox*, 35 Fed. 575).

The acts involved in the Runkle case plainly belong to the last class, described as entirely judicial in character; and we contend that the doctrine of the Runkle case is *limited* to acts of this class.

The acts involved in the present mandamus litigations, since no rights of liberty or of property are at stake (supra, p. 19), belong to the second class, that of acts merely involving judgment and discretion. Not only may the President delegate authority to perform acts of this class, but he may also, as the judicial precedents show, delegate authority to perform acts of the third class, acts that are appropriately called quasi judicial.

To speak of a determination as "judicial" when it not only never has the effect of *res judicata* (as in class 4, supra), but does not determine any right of liberty or of property (as in class 3, supra) is far from appropriate. We have met with only one instance in which this use of the word "judicial," is found in the

opinions of this court, viz, in Justice Field's opinion in *Wisconsin Railroad* v. *Price County*, 133 U. S. 496, 511.

But that eminent jurist more than makes amends by his elucidation of what is "judicial," in the course of his opinion in *The Sinking Fund cases* (99 U. S. 700, 761). He says:

> Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one.

3. In what sense, then, did Chief Justice Waite use the word "judicial" when he enunciated the doctrine in the *Runkle case?* We submit that the answer to this question is apparent from the context of his opinion. He says:

> "The heads of departments are his" [the President's] "authorized assistants in the performance of his *executive* duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. * * * Here, however, the action required of the President is judicial in its character, *not administrative*. * * * He is himself to consider the proceedings" [of the court-martial] "laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the" [ordinary] "members of the court-martial itself."
>
> *Runkle* v. *U. S.*, 122 U. S. 543, 557.

> been committed the important *judicial power of finally determining* upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the Army of the United States shall be dismissed from service as *a punishment for an offence* with which he has been charged, and for which he has been tried.

The Chief Justice then quotes Attorney General Bates' description of the essential nature of a court martial inter alia as follows:

> "The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice * * *. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence can not be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law."
>
> *Runkle* v. *U. S.*, 122 U. S. at 557, 558.

The opinion of Attorney General Bates, thus approved by Chief Justice Waite, was one holding that the decision of a court-martial ranks as *res judicata*. In advising the Secretary of the Navy, March 12,

1864 (11 Ops. Atty. Gen. 19), that upon approval of the conviction of a naval officer, the effect of the judgment could only be modified by resort to the pardoning power, the Attorney General also stated that if the President disapproved the sentence of conviction of a court-martial and thus, in effect, pronounced judgment of acquittal, the President would be without power, after promulgation of his formal decision, to revoke the same and to render the sentence of conviction effective by approving it.

A court-martial, with its prosecuting attorney and attorney for the accused, adjudicates upon a "contest," as that word was used by Mr. Justice Brewer in *Orchard* v. *Alexander* supra. It is a court of law to the fullest degree and in every sense, except only that, instead of exercising the judicial power of the United States under Article III of the Constitution, it is a "legislative court" like the Territorial courts (*McAllister* v. *United States*, 141 U. S. 174, 181). But the authority of courts-martial and other legislative courts is equal to, and coordinate with, that of the courts created under the "judicial power" provision of the Constitution (Art. III, sec. 1).

> *United States* v. *Maney*, 61 Fed. 140, 143.
> *Wales* v. *Whitney*, 114 U. S. 564, 570.

Judge Wallace, in announcing the decision of the U. S. Circuit Court in the case of *In re Davison*, 21 Fed. 618, 620, said:

> Courts-martial are lawful tribunals existing by the same authority [Congress] that this court is created by, have as plenary juris-

> diction over offenses by the law military as this court has over controversies committed to its cognizance and, within their special and more limited sphere, are entitled to as untrammeled an exercise of their powers.

In delivering the unanimous judgment of this court in *Grafton* v. *United States* (206 U. S. 333) Mr. Justice Harlan, after pointing out (p. 348) that the jurisdiction of courts-martial over crimes "is not exclusive, but only concurrent with that of the civil courts," declared (at p. 352):

> Congress has chosen in its discretion to confer upon general courts-martial authority to try an officer or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that was done, the judgment of such military court was placed *on the same level* as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb.

Among the numerous cases supporting the proposition that courts-martial are judicial tribunals in every sense are:

> *Carter* v. *Roberts*, 177 U. S. 496, 498.
> *Carter* v. *McClaughry*, 183 U. S. 365, 380, 383, 390.
> *Ex parte Reed*, 100 U. S. 13, 21, 23.
> *Swain* v. *United States*, 165 U. S. 553, 558.
> *Givens* v. *Zerbst*, 255 U. S. 11, 19.
> *U. S.* v. *McDonald*, 265 Fed. 754, 760.
> *United States* v. *Praeger*, 149 Fed. 474, 485.

The nondelegable acts of the President, described in the Runkle opinion as "judicial in character, not

administrative," are therefore confined to acts of the *entirely* judicial, or fourth class (supra, p. 45).

4. The sense in which Chief Justice Waite used the word "judicial" in the Runkle case accords with the best usage. Under this usage, action in administering and carrying into effect the elimination statute of June 4, 1920, is aptly described as political action or discretionary executive action (second class, supra), but not as either quasi judicial, or entirely judicial action. For instance, the acts of the elimination boards functioning under section 11 of the statute of July 15, 1870 (16 Stat. 315), acts which, in their essential nature, are identical with those under section 24b of the present statute, have been judicially declared to be acts neither of a judicial nor of a quasi judicial tribunal (*Sherburne* v. *United States*, 16 Ct. Cls. 491, 499).

An accurate and fairly complete statement of the various judicial and quasi judicial determinations which the administrative officers of the United States are empowered by law to make is found in section 309 of Prof. Chaplin's "Principles of the Federal Law." His enumeration of quasi judicial acts of administrative officers of the United States Government, intended, no doubt, to be complete, is found to include only cases in which some property right or right of liberty is at stake or affected by the administrative determination. The inference is unavoidable that Prof. Chaplin regards an administrative act or determination as judicial or quasi judicial, only when a right of liberty or of property is at stake.

This view has also been frequently expressed in judicial decisions.

The following test of what constitutes judicial (including, of course, quasi judicial) action by administrative officers and bodies has been adopted by the Supreme Court of Minnesota:

> To render the proceedings of special tribunals, commissioners, or municipal officers judicial in their nature, they must affect the *rights or property* of the citizens in a manner analogous to that in which they are affected by the proceedings of courts acting judicially. * * * Where proceedings are judicial, if no right of appeal is given, certiorari will lie, but the fact that no right of appeal is given has no bearing on the question whether the proceedings are judicial in their nature.
>
> *State ex rel. Grant* v. *Inverson*, 100 N. W. 91, 92, 92 Minn. 355, quoting
>
> *State ex rel. Hardy* v. *Clough*, 67 N. W. 202, 64 Minn. 378.

The same test has been applied in ascertaining the essential nature of an administrative determination recognizing or denying a pension claim; to wit, that the determination is a quasi-judicial act if, and only if, the pension claim represents a property right. Assuming the existence of a pension statute, a pension claim becomes a property right in respect of the period from and after the arising of the disability or the happening of any other contingency, upon which the right thereto is made to depend, and continuing thereafter while the same situation exists and while the statute granting the pension remains unrepealed.

> *Gibbs* v. *Minneapolis Fire D. Relief Assoc.*, 125 Minn. 174, Ann. Cas. 1915 C 749.

Kavanagh v. *Police Pension F. Com'rs*, 134 Cal. 50, 66 Pac. 36, 37.
Rudolph v. *U. S.*, 36 App. D. C. 379.
Pennie v. *Reis*, 132 U. S. 464, 471.

Thus in *Stevens* v. *Minneapolis Fire D. Relief Assoc.* (124 Minn. 381, 50 L. R. A., N. S., 1018, 1023), the court said:

> It is clear that in determining the question whether a member shall be dropped from the pension list and thereby deprived of the benefits conferred and vested thereby, the association acts in at least a quasi judicial capacity; *for the determination affects* the *vested legal rights* of the pensioner.

The same test was applied in *Baker* v. *Gooding County* (25 Idaho 506; 138 Pac. 342, 345) in considering whether the action of highway commissioners, when they assumed to raise money for highways by bonding, was judicial. The court pointed out, in effect, that the problem related to quasi judicial action rather than to judicial action, saying:

> When the term "judicial" is applied to the action of such boards, it is not to be received in the same sense usually applied to courts.

The court then continued by quoting and adopting the following language from *Robinson* v. *Sacramento:*

> "It is sufficient" (for their action to rank as quasi judicial) "if they are invested by the legislature with power to *decide on the property or rights of the citizen.*" (16 Cal. 208.)

In New Jersey, there is an interesting line of cases defining what is judicial (or rather quasi judicial),

in connection with the granting of writs of certiorari to review the acts and determinations of executive officers. In New Jersey, not only does the usual rule prevail that neither purely ministerial acts nor political acts are reviewable on certiorari, but it is established that, under the wording of the New Jersey constitution, the power of the Supreme Court to review on certiorari the judicial and quasi judicial acts of inferior special tribunals and of administrative officers and bodies cannot be impaired by legislative enactment (*McCullough* v. *Essex Circuit Court*, 59 N. J. L. 103, 34 Atl. 1072; *In re Roebling's Estate*, 108 Atl. 359), so that the statutory power of the governor (who in New Jersey is not amenable to control by the courts) to remove a public-utilities commissioner was apparently deemed constitutionally valid, only because the governor's act of removal was not judicial or quasi judicial (*McCran* v. *Gaul*, 112 Atl. 603, 606). In the line of cases referred to, the right to certiorari and the quasi judicial character of the act to be reviewed thereunder were made to depend upon whether or not such act affected private rights of liberty or of property or contract.

Moore v. *W. Jersey Traction Co.*, 62 N. J. L. 386; 41 Atl. 946, 948.

Sears v. *Mayor of Atlantic City*, 73 N. J. L. 710; 64 Atl. 1062, 1063: 72 N. J. L. 435; 60 Atl. 1093, 1094.

Erie R. R. v. *Paterson*, 79 N. J. L. 512; 76 Atl. 1065, 1066.

Amer. Malleables Co. v. *Bloomfield*, 83 N. J. L. 728; 85 Atl. 167, 170.

Borough of Verona v. *Freeholders*, 88 N. J. L. 55; 95 Atl. 730, 731.

In the case of *Amer. Malleables Co.* v. *Bloomfield* (supra), for instance, a resolution of the town council, which involved changing the level of a manufacturer's railway siding, was set aside on certiorari, Mr. Justice Voorhees saying:

> It interfered with private rights; and *therefore* was judicial in its character.

Other decisions recognizing the same test of what is judicial are:

> *People* v. *Oakland Board of Education*, 54 Cal. 375, 377.
>
> *Greenough* v. *School Com. of Pawtucket*, 27 R. I. 428; 62 Atl. 978.
>
> *Newell* v. *Franklin*, 30 R. I. 258, infra.
>
> *State ex rel. Milw. Med. College* v. *Chittenden*, 127 Wis. 468; 107 N. W. 500, 511, 512.
>
> *In re County Commissioners*, 22 Okl. 435; 98 Pac. 557, 560.
>
> *State ex rel. Atty. Gen.* v. *Hawkins*, 44 Ohio St. 98; 5 N. E. 228, 232.
>
> *Woodmont Ass'n* v. *Town of Milford*, 85 Conn. 517; 84 Atl. 307, 310.
>
> *Kalbfell* v. *Wood*, 193 Mo. 675; 92 S. W. 230, 233.

The same conception of what is judicial has been recognized in substance by this court. *Interstate Com. Commission* v. *Cincinnati, etc., Railway*, 167 U. S. 479, 499. *Hibben* v. *Smith*, 191 U. S. 310, 321, 322. The following statement, for instance, received its unanimous approval:

> "In the comparatively few cases in which such questions" [those involving the validity

> or the conclusiveness of administrative determinations] "have arisen, it has been distinctly recognized that administrative *orders, quasi judicial in character, are void if a hearing was denied;* if that granted was inadequate or manifestly unfair."
>
> *Interstate Commerce Commission* v. *L. & N. Railroad*, 227 U. S. 88, 91.

But all administrative orders that are void where hearings are denied are orders affecting rights of liberty or of property. This Court, therefore, said in substance in the passage just quoted that no administrative orders are quasi judicial, except those which involve rights of liberty or of property. That this was really the meaning of the Court is confirmed upon an examination of the precedents which it cited (227 U. S. at 91, 92) immediately after the passage quoted. The "administrative orders quasi judicial in character" to which these precedents relate are:

> Administrative orders excluding or deporting alleged foreigners from the United States (involving liberty):
>
> *Tang Tun* v. *Edsel*, 223 U. S. 673.
> *Chin Yow* v. *U. S.*, 208 U. S. 8.
> *Low Wah Suey* v. *Backus*, 225 U. S. 460.
> *Zakonite* v. *Wolf*, 226 U. S. 272.
>
> Administrative orders requiring railways to establish physical rail connections with each other or schedules of connecting trains (involving property rights):
>
> *U. S.* v. *B. & O. S. W. Ry.*, 226 U. S. 14.
> *A. Coast Line* v. *N. C. Com.*, 206 U. S. 1.
> *Wis. Railroad* v. *Jacobson*, 179 U. S. 287.
> *Oregon Railroad* v. *Fairchild*, 224 U. S. 510.

Administrative orders fixing freight rates (involving property rights):

S. Pacif. Co. v. *Interstate Com. Commission*, 219 U. S. 433.

Administrative orders regulating distribution of railway cars to shippers (involving property rights):

Int. Com. Commission v. *Ill. C. Railroad*, 215 U. S. 452.

Administrative determinations fixing the value of importations and therefore the amount of customs duties (involving property rights):

Muser v. *Magone*, 155 U. S. 240.

Other administrative determinations which have been described as of a judicial nature are decisions of the Land Office fixing the rights of private persons to public lands under the preemption, homestead, and other statutes:

Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316, 324.

Bates & Guild v. *Payne*, 194 U. S. 106, 108.

On the other hand, the determination of whether American citizens who have discovered guano on an unclaimed island shall have the benefit of its being treated as American soil constitutes an exercise, under the act of August 18, 1856 (11 Stat. 119), of "a strictly executive power." (*Jones* v. *United States*, 137 U. S. 202, 217.)

Quasi judicial decisions of this nature were in one case referred to by Mr. Justice Matthews as the antitheses of ordinary executive or administrative

determinations which, without affecting property rights, involve the exercise of discretion. He said:

> "The language of the section of the Revised Statutes (§453) describes the duties of the Commissioner" [of the General Land Office,] "to be performed under the direction of the Secretary, as executive duties, while those which relate to the decision of *questions of private right* under the preemption laws, being *quasi judicial*, are made by §2273 expressly subject to an appeal.
>
> *Butterworth* v. *Hoe*, 112 U. S. 50, 56.

That acts and determinations of administrative officers do not become judicial in any degree merely because they involve judgment and discretion was ruled in:

> *Hammer* v. *Smith*, 11 Ariz. 420, infra, p. 62.
>
> *Newell* v. *Franklin*, 30 R. I. 258; 74 Atl. 1009, 1011.
>
> *Greenough* v. *School Com. of Pawtucket*, 27 R. I. 428; 62 Atl. 978.

The acts and determinations of a court of inquiry have been held by the Judge Advocate General of the Army not to be judicial in character. (J. A. G. 25052, Nov. 4, 1920.)

5. Under the authorities, supra, every act in effectuating the terms of the elimination section (24b) of the present Army reorganization statute is manifestly either purely ministerial or is political or executive (classes 1 and 2, supra, p. 44) and is neither entirely judicial nor quasi judicial (classes 3 and 4). Action under section 24b shares with quasi judicial action, it is true, the feature of being con-

clusive against collateral attack. But this is a feature common to all administrative action in which scope for the exercise of any discretion is permitted (*Keim* v. *United States*, 177 U. S. 290, 293; *Eberlein* v. *United States*, Opinion Nov. 7, 1921 by Mr. Justice Day).

In its essential nature, however, action under section 24b differs widely from judicial or quasi judicial action. The essential nature of the former consists in this: That it strives to promote the usefulness of the Army and the advantage and welfare of the Nation; but such action, in legal contemplation, is taken by the Nation without reference to the interest of individuals.

Reaves v. *Ainsworth*, 219 U. S. 296, 305.
Shoemaker v. *U. S.*, 147 U. S. 282, 301.
Sherburne v. *U. S.*, 16 Ct. Cls. 491, 499.
Street v. *U. S.*, 24 Ct. Cls. 230, 247, 248.

Relators' position, while appearing in proceedings in which their elimination was being passed on, was very similar to that of an author or publisher of a textbook which, after initial investigation and selection, has been in use for some time in the public schools, but which is being considered anew, with reference to its being eliminated or yielding to the textbook of some other author or publisher. Even though the former author or publisher were, by statute, given a hearing and the right to call his own witnesses and to cross-examine other witnesses before the school committee or the board of education, his position would bear no analogy to that of a party litigant whose legal rights are at

stake, for he would be merely cooperating in the public interest (*People* v. *Oakland Board of Education*, 54 Cal. 375, 377); and not the less so, in legal theory, because the legislature might have sought to promote the public good by taking advantage of the zeal that selfish interest inspires.

A somewhat similar situation arises upon a public auction conducted by the State, when, of several competing bidders, each claims to be "the best responsible bidder" and therefore entitled, under some statute, to be awarded the contract. Neither of them, however, resembles a party litigant or has any legal interest, in the nature of a property right, in the question to be determined by the representatives of the State. As was said in *Hammer* v. *Smith*, 11 Ariz. 420, 94 Pac. 1121 (and quoted in *Newell* v. *Franklin*, 30 R. I. 258), "The discretion and judgment exercised" (by the State's representatives) "in this matter are those of an agent seeking the best interest of his principal." "There is no issue, because there is but one party in interest—the public."

The Army authorities are in no sense trying the legal rights of an officer suggested for elimination under section 24b; they are merely subserving the interests of the Nation in the manner commanded by statute.

It is true that their action in promoting the efficiency of the Army through the retiring or discharge of an officer whose services are no longer needed, may *incidentally* diminish or terminate the pay to which he has been confidently looking forward. But

pay for prospective military services is not a property right (supra, p. 19); and neither the fixing of the amount of such prospective pay (*Smith* v. *Strother*, 68 Cal. 194, 8 Pac. 852; *Interstate Commerce Com.* v. *Cin., etc., Railway*, 167 U. S. 479, 499), nor the fixing of the duration of such prospective services (*In re County Commissioners*, 22 Okl. 435, 98 Pac. 557, 563) involves judicial or quasi judicial action.

An Army officer's position is, therefore, exactly that of which he is warned by the language of his commission, which reads:

> This commission to continue in force during the pleasure of the President of the United States for the time being.

(d) **Under the decided cases, acts essentially analogous to that of a presidential review of the finding of the final classification board (were such review required) are delegable.**

The judicial authorities support overwhelmingly the proposition that the President, by general or by special authorization, may delegate to the head of an executive department the performance (1) of acts that are ministerial; (2) of acts that are political or executive, involving discretion; and even (3) of acts that are quasi judicial, but not entirely judicial in character. And this is true, even in performing acts which, by statutes unlike the one now under consideration, are *expressly* required *to be performed by the President*.

Prof. Wyman (Administrative Law, sec. 63) regards the delegation of powers as the *foundation*

upon which any adequate theory of centralized administration must be built (p. 204).

The rule in the *Runkle case*, he regards as an exception to the general principle. Indeed, the authorized discharge by administrative officers of *entirely* judicial functions, such as trying and sentencing men to death or imprisonment for offenses, could not be other than exceptional.

Prof. Wyman regards the rule in *Williams* v. *United States* (1 How. 290, *infra*), and in *Hisey* v. *Peters* (1896 Pat. Dec. 22, *infra*), as the one of general application. Both cases involved delegation of power to make a determination involving discretion, the former belonging to the second class *supra* (p. 44), and the latter to the third or quasi judicial class. In the Williams case (as in the present case), the particular determination whose validity was contested had not been made by the President, although the statute (3 Stat. 723) required "the *especial direction* of the President." He had, however, made a general anticipatory delegation to the appropriate department head of all his powers derived from the statute involved.

It is, no doubt, true that if the delegation of the President's duties were to be governed by the same rule as that which governs the delegation by a private agent of the duties of the latter, only acts of a purely ministerial nature could be delegated. And so, indeed, it was argued by Mr. Bradley in *Williams* v. *U. S.* (1 How. at 291, 293), but this court unanimously adopted the contrary rule. To

Mr. Bradley's argument based on the "general rule * * * that discretionary powers can not be delegated," Attorney General Legaré replied (1 How. at 292):

> If the President could not delegate this power, he could do little else but look at marshal's accounts. But this court have recognized the authority to delegate. *Wilcox* v. *Jackson*, 13 Pet., 498; 10 Id., 291; 1 Id., 296.

In upholding the President's right of delegation Mr. Justice Daniel said:

> While it has been doubtless the object of Congress to * * * limit, as far as was proper, the discretion of subordinate agents over the public money, it never can be reasonable to ascribe to them a conduct which must defeat every beneficial end they could have in view and render the Government an absolutely *impracticable machine*. The President's duty in general requires his superintendence of the administration; yet this duty *cannot* require of him to *become the administrative officer of every department and bureau* or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This can not be, 1st, because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the government in the personal action of the one chief executive officer. It cannot be, for the stronger reason, that it is impracticable—nay, impossible.
>
> *Williams* v. *U. S.*, 1 How. 290, 296.

The gist of the *Williams* decision was thus summarized by Mr. Justice Curtis in a later case:

> The Supreme Court * * * held that *general instructions by the President* to the Secretary of the Treasury *to make such advances* to the marshals of the United States *as the Secretary should deem proper*, and the act of the Secretary in making the advance *brought the case under this law.*
>
> *United States* v. *Cutter*, 2 Curt. 617.

In another case involving the President's right to delegate the powers conferred upon him by the same statute, which required his "especial direction," Mr. Justice Grier said:

> The Secretary of the Navy represents the President and exercises his power on the subjects confided to his department.
>
> *United States* v. *Jones*, 18 How. 92, 95.

The other case, regarded by Prof. Wyman as illustrative of the fundamental principle involved, is that of *Hisey* v. *Peters* (1896, Pat. Dec. 22), a case in which the right of an inventor to the benefit of a patent under the statutes was at stake—clearly a property right. The examiner decided adversely to Hisey, the inventor, on the ground of interference. Hisey appealed to the Commissioner of Patents, who delegated to the Assistant Commissioner the determination of the appeal, although the statute expressly gave Hisey the right to "appeal to the Commissioner *in person*" (R. S. 4910; Comp. St. 9455). Commissioner Seymour refused to treat as void the determination so made, saying, sub-

stantially in the language of this court in *Parish* v. *United States*, 100 U. S. 500, 504:

> It would be a singular doctrine and subversive of the purposes for which these offices of assistants have been created, if their acts were to be held of no force until ratified by the head. It is to relieve the overburdened principal of performance in person of a part of his duties that this office is established. If no virtue attaches to the acts of this assistant until approved by the head, any inferior clerk would answer the purpose.
>
> Wyman, Administrative Law, p. 208.

In passing upon precisely the same question of delegating patent appeals, Chief Justice Alvey said:

> The hearing and deciding appeals is a duty pertaining to the office of the Commissioner of Patents and may, therefore, be assigned to be performed by the assistant commissioner. It is urged in argument that such an assignment to duty is a *delegation of judicial power* that belongs to and can only be performed by the commissioner in person. But we are not of that opinion.
>
> *Stapleton* v. *Duell*, 17 App. D. C. 575, 583.

The court did *not* uphold the right of the commissioner to delegate his quasi judicial functions *to any subordinate* whom he might choose, but only to the assistant commissioner, who by statute was authorized to "perform such duties pertaining to the office of the Commissioner of Patents as may be assigned to him by the commissioner." (R. S. 476 as amended by act of July 11, 1890; Comp. St. 736.)

The President enjoys an entirely *analogous statutory power to delegate his functions to the Secretary of War*, who is expressly authorized to "perform such duties as shall * * * be intrusted to him by the President relative to * * * the military forces * * * or to other matters respecting military affairs" and to "conduct the business of the department in such manner as the President shall direct." (R. S. 216; Comp. St. 318.)

As a matter of ordinary usage of words, the Secretary of War is not spoken of as the President's assistant or the Assistant President for military affairs, but such is, in truth, his status. He and, in general, "the heads of departments are his" [the President's] "authorized assistants in the performance of his executive duties" (*Runkle* v. *U. S.*, 122 U. S. 543, 557). And it is usual for Congress to provide expressly that the heads of departments shall perform such duties, of the appropriate nature, as may be assigned to them by the President; for instance, in R. S. 202 as to the Secretary of State, and in R. S. 248 as to the Secretary of the Treasury. By an extension of this principle, the N. Y. Court of Appeals has described the sheriff as the governor's assistant.

In re Guden, 171 N. Y. 529; 64 N. E. 451.

The principle of the Stapleton case was fully recognized and applied in *John Shillito Co.* v. *M'Clung* (51 Fed. 868, 871). There, the question presented was as to the effectiveness of a decision made by the Assistant Secretary of the Treasury, pursuant to delegated authority, upon a statutory appeal

taken by Messrs. Shillito, importers, from an assessment of customs duties made by the collector of customs. Shillito insisted, although unsuccessfully, that this decision was void because the statute (R. S. 2931) expressly required a decision by the Secretary. The Assistant Secretary's authority to to discharge *all* of the functions of the Secretary, like that of practically all other statutory assistants, designated as such by statute, is not extended by express statute (R. S. 177) beyond cases in which the Secretary is absent or sick. That the Secretary gave no personal consideration to the case was conceded by demurrer.

In the opinion, which was concurred in by the present Chief Justice of this court, Mr. Justice Jackson, afterwards a member of this court, referred to R. S. 245, 161, 179, 177, and 236, the first of which sections (like R. S. 216 as to the Secretary of War) requires assistant secretaries of the Treasury to "perform such other duties . . . as may be prescribed by the Secretary" and then said:

> "It admits of no question that under the foregoing provisions *the Secretary of the Treasury could have assigned* to the assistant secretary or secretaries of the Treasury Department *the duty of deciding appeals* from assessments made by collectors of customs duties * * *. The reply does not negative the fact that the assistant secretary was not assigned by the Secretary of the Treasury to the performance of the duty of deciding the appeal."
>
> *John Shillito Co.* v. *M'Clung*, 51 Fed. 868, 871, 872.

Mr. Justice Jackson then quoted from *Parish* v. *United States*, 100 U. S. 500, 504, the passage relied on by Commissioner Seymour supra and based his decision upon the presumed delegation of the Secretary's authority.

It is manifest that the distinguished jurists who decided the *Hisey case* in 1895, the *Stapleton case* in 1901, and the *Shillito case* in 1892, respectively, understood the doctrine in the *Runkle case*, which had been decided in 1887, as applying only to the delegation of functions *entirely judicial* in character and as not forbidding the delegation of *quasi judicial* functions. The same conception of the Runkle doctrine was evidently shared by all the justices of this court in 1910, when they made their decision in *United States* v. *Chicago, M. & St. P. Railway* (218 U. S. 233, 243); for the opinion of the court does not purport to overrule, and does not even cite, the *Runkle case*.

This action against the railway was one which sought an adjudication that 4,100 acres of land in Iowa, to which the railway in 1880 had obtained a patent, were not legally its property. Its right to the lands depended upon their not having previously been reserved from the public domain for aiding internal improvements or otherwise (act of May 12, 1864; 13 Stat. 72). By the (so-called swamp lands) act of September 28, 1850 (9 Stat. 519), all public lands that were unfit for cultivation, on account of being swamp or overflowed lands, were granted to the several States wherein they were

located, and the Secretary of the Interior was directed to identify such lands by making out a list or plat of them. Certain counties of Iowa, which had succeeded to the rights of that State, selected the lands in suit as swamp lands prior to 1864.

The language of section 2 of the 1850 swamp lands act (now R. S. 2480), requiring the Secretary of the Interior to make "accurate lists and plats" of such swamp lands, has been frequently construed as conferring upon the Secretary of the Interior power to decide conclusively whether, for the purpose of disposing of the lands pursuant to the direction of the statute, any particular lands were swamp lands or not and, of course, to pass upon the character of lands claimed or selected under that act.

French v. *Fyan*, 93 U. S. 169, 171.
Heath v. *Wallace*, 138 U S. 573, 585.
Chandler v. *Calumet Mining Co.*, 149 U. S. 79, 91, 92.
Wright v. *Roseberry*, 121 U. S. 488, 509.
Mich. Land Co. v. *Rust*, 168 U. S. 589, 592.
Warner v. *Valley Stock Co.*, 9 App. D. C. 187.
Brown v. *Bliss*, 13 App. D. C. 279.
Cramer v. *Keller*, 98 Mo. 279; 11 S. W. 734.

By the act of March 5, 1872 (17 Stat. 37), Congress required the Commissioner of the General Land Office to examine the selections already made in Iowa "and allow or disallow said selections." This was, however, not a new function of the commissioner. Before 1872, it had been a part of his regular duties, assigned to him by the Secretary of the Interior, to investigate and hold hearings upon the

character of lands alleged to be swamp lands and to make findings in respect thereof (*McCormick* v. *Hayes*, 159 U. S. 332, 337, involving also lands in Iowa).

These nonstatutory determinations of the commissioner were, of course, subject to modification by the Secretary, if he saw fit to intervene; the theoretical responsibility for the decision of the Interior Department being always that of the Secretary, a responsibility which the 1850 swamp lands act cast upon him. As repeals and amendments by implication are not favored (*Henrietta Mining Co.* v. *Gardner*, 173 U. S. 123, 128), the effect of the 1872 act was doubtless to work no change in the 1850 act as to whose decision should conclude the rights of the parties, but only to require hearings and an *advisory* determination by the commissioner. In any event, by section 2480 of the act of June 22, 1874 (R. S. 2480; 18 Stat. at L., part 1, p. 456), Congress reenacted the *identical language* of the 1850 act, in so far as it had been, and has been, held effective by the courts to empower and direct the *Secretary* to make for the Government its binding decision as to whether lands are swamp lands or not. The 1872 act, if inconsistent with the 1850 act, was necessarily inconsistent with the 1874 act and, to the extent of the inconsistency, it was superseded by the 1874 act.

In 1876, the commissioner passed upon the claims of the Iowa counties and determined that the lands were not in fact swamp lands and could not properly be included in any list of the lands falling within the scope of the swamp lands act of 1850.

This determination was regarded by the railway as conclusive in favor of the effectiveness of its patent; deeming it supported by a valid delegation of power to the commissioner, despite the contrary contention, based on want of a *personal* determination by the Secretary of the Interior.

The determination made by the commissioner denied to the Iowa counties property rights asserted by them and was plainly *quasi judicial* (*Ness* v. *Fisher*, 223 U. S. 683, headnote 1; *United States* v. *Minor*, 114 U. S. 233, 243). Their legitimate rights were thus stated:

> "By the act of 1850, Congress granted *in presenti* to the State only swamp and overflowed lands within its limits, and the State legally * * * passed its interest in such lands to the counties in which they were situated." (218 U. S. at 243.)

Nevertheless, this court held unanimously that the powers of the Secretary under the swamp lands act were enjoyed by the commissioner (through presumed delegation of such powers). Mr. Justice Harlan said:

> "In determining this case, it must not be overlooked that the act of Congress *confers upon the Secretary* of the Interior and upon him *alone*, the power to identify particular lands as swamp and overflowed lands embraced by the act of 1850." (218 U. S. at 242.)

Whether Mr. Justice Harlan regarded that power as possessed by the Secretary continuously from 1850 to 1876 when it was exercised, or whether he regarded

it as interrupted March 5, 1872, and restored June 22, 1874, to the Secretary, does not appear; nor is it of any moment.

The fact that Mr. Justice Harlan regarded his decision as *turning upon the right to delegate* the making of a determination as to whether the lands were swamp lands, plainly appears from his following the sentence which asserts that the Secretary *alone* has power to make such determination, with a sentence in which he approves and relies on *French* v. *Fyan* (93 U. S. 169, 171) and *Ehrhardt* v. *Hogaboom* (115 U. S. 67, 68). These were cases in which the 1850 swamp lands act, although it names only the Secretary of the Interior, is construed as constituting the *Interior Department* a tribunal for the determination of the character of the lands in question. In other words, this determination, if made by the Secretary's proper subordinate, is to be deemed a compliance with the statute, although not made personally by the Secretary.

After adverting to the *notice to all parties concerned*, which the commissioner had caused to be given and to the fact that the commissioner had actually decided, and decided adversely the claims of Iowa and of its counties, Mr. Justice Harlan continued:

> "That decision" [of the commissioner] "was in contemplation of law one by the Secretary of the Interior, who, by the original act of 1850, was directed to make out accurate lists or plats of the lands described by that act as swamp or overflowed lands. *Wilcox* v. *Jackson*, 13 Pet. 498; *Wolsey* v. *Chapman*, 101 U. S. 755, 768."

United States v. *Chic., M. & St. P. Railway*, 218 U. S. 233, 243.

As the commissioner's determination was not made in the period between March 5, 1872, and June 22, 1874, no allusion to the act of 1872 was essential to the legal reasoning of Mr. Justice Harlan. The allusion made by him on page 243 of the report was doubtless due to the fact that the parties had *stipulated* that the hearings before the commissioner were had pursuant to the act of March 5, 1872 (Stip., art. 8; printed transcript in the swamp act case, fol. 41). The allusion may also imply that the judge regarded that part of the act of 1872 which required hearings and a (provisional) determination by the commissioner and was therefore *consistent* with R. S. 2480, as remaining in force after June 22, 1874.

But Mr. Justice Harlan was not invited to consider any contention that the commissioner *virtute officii* had power to make the quasi judicial determination which, by delegation of the Secretary's power, he in fact made. No such proposition was put forward by either counsel in the case or by the District Court or the Circuit Court of Appeals (*U. S.* v. *Chic. M. & St. P. Ry.*, 148 Fed. 884, 891; 160 Fed. 818, 820). All of them must have realized that, if the act of 1872 could be viewed as clothing the commissioner with quasi judicial functions, it had been repealed, to that extent, by the act of June 22, 1874.

Throughout this litigation, the railway counsel never contended that the commissioner's 1876 decision in favor of the railway was binding, inde-

pendently of authority delegated by the Secretary, but expressly conceded the contrary.

Mr. Vroman's brief in this court pp. 9, 10.

Mr. Justice Harlan, who *participated in* the decision in the Runkle case, could not have overlooked it, when he came to prepare his opinion in the swamp land case, *supra*. Manifestly, he regarded it as not impairing the correctness of the views expressed in *French* v. *Fyan* and *Ehrhardt* v. *Hogaboom; a fortiori* as not impairing the rulings in *Wilcox* v. *Jackson* and *Wolsey* v. *Chapman*. For he expressly relied on these four cases as precedents. Quasi-judicial acts were involved in the two former cases and only political, or discretionary acts, in the two latter cases. In all four cases, the acts were deemed delegable by each of the several officials required by statute to perform them and delegable to his principal, appropriate subordinate.

Indeed, the decision in the Runkle case did not involve the enunciation of any new principle not fully recognized and applied by this court before that time. This will be manifest, if a comparison is made between its decisions on the subject of the delegation of the President's powers made before, and its decisions made after 1887, when the Runkle case was decided.

Attention is invited to the following:

Cases decided before 1887.

Marbury v. *Madison*, 1 Cranch. 137, 166.
Parker v. *United States*, 1 Pet. 293, 297.
Wilcox v. *Jackson*, 13 Pet. 498, 513.
Williams v. *U. S.*, 1 How. 290, 296, 297.

United States v. *Freeman*, 3 How. 556, 566.
United States v. *Jones*, 18 How. 92, 95.
French v. *Fyan*, 93 U. S. 169, 171.
Parish v. *United States*, 100 U. S. 500, 504.
Wolsey v. *Chapman*, 101 U. S. 755, 769, 770.
Ehrhardt v. *Hogaboom*, 115 U. S. 67, 68.

Cases decided after 1887.

Jones v. *United States*, 137 U. S. 202, 217.
Wood v. *Beach*, 156 U. S. 548, 550.
United States v. *Chic., M. & St. P. Railway*, 218 U. S. 233, 242, 243.
United States v. *Morrison*, 240 U. S. 192, 212.
Chic., M. & St. P. Railway v. *United States*, 244 U. S. 351, 356, 357.
N. Pacif. Railway v. *Wismer*, 246 U. S. 283, 287, 288.
Norris v. *United States*, decided November 7, 1921; Opinion by Mr. Justice Day.

In the case last cited, the power of removal of Federal employees was held by this court to be delegable and the following language was used:

> "The objection urged upon our attention is that the order was made by an Assistant Secretary. We have no doubt of the authority of the Assistant Secretary of the Treasury to take this action. Section 245 of the Revised Statutes provides: 'The Assistant Secretaries of the Treasury shall * * * perform such other duties in the office of the Secretary of the Treasury as may be prescribed by the Secretary or by law'. * * * There is nothing in the record to show that the action of the Assistant Secretary did not have the full sanction and approval of the Secretary. Under such circumstances, the act of the

> Assistant Secretary must be presumed to be within the scope of the authority which the Secretary conferred upon his Assistant. *McCollum* v. *United States*, 17 Ct. Cls. 92."

In like manner, President Wilson conferred (although expressly) upon his Assistant, Mr. Baker (*Runkle* v. *U. S.* 122 U. S. 543, 557) the authority disputed by plaintiffs in error. R. S. 216 bears the same relation to the present question that R. S. 245 bore to that decided by this court in the Norris case (see supra p. 68).

In all of these cases, both those decided before, and those decided after 1887, this court considered and upheld administrative determinations, involving judgment and discretion (some of them quasi judicial in character), and made pursuant to *delegated authority;* and the court has shown no tendency after 1887 to narrow, in these cases, the doctrine which it applied before that year.

The simple fact is that in the Runkle case, the court regarded the President as ceasing, for the time being, to act as the Executive and as being transformed into a special and highly important part of a military court.

So far back as in *Marbury* v. *Madison* (1 Cranch. 137, 166), decided in 1803, Chief Justice Marshall said:

> The President is invested with certain important political powers, in the exercise of which he is to use his own discretion * * *. To aid him in the performance of these duties, he is authorized to appoint certain officers,

> who act by his authority, and in conformity with his orders. In such cases, *their acts are his acts* * * *. Where *the heads of the departments* are the political or confidential agents of the Executive, merely to execute the will of the President or *rather* to *act in cases in which the Executive possess a* constitutional or legal *discretion*, * * * their acts are only politically examinable.

What Chief Justice Marshall had in mind seems clearly to have been a general, anticipatory delegation of matters of a particular nature to the heads of departments. The same thought was afterwards expressed by Mr. Justice Duval as follows:

> The President * * * may issue the order himself, or it may be done by the Secretary of War, with his approbation. The Secretary of War, as the legitimate organ of the President, under a *general authority* from him, may exercise the power, and make the allowance to officers having a separate command.
>
> *Parker* v. *United States*, 1 Peters 293, 297.

The plain meaning is that the President need not *personally* sanction the determination; it is enough if it be sanctioned by the appropriate officer of the Executive, directed or permitted to act in the matter pursuant to *general authority* from the President.

> *In re Brodie*, 128 Fed. 665, 670 (per Van Devanter, J.)

And it was unquestionably with reference to the presumption of a general, anticipatory delegation of power that Mr. Justice Van Devanter said in *Chic. M. & St. P. Railway* v. *United States*, 244 U. S. 351, 357:

> The power to establish the reserve included the power to make the temporary withdrawal, and the act of the Secretary of the Interior in directing the latter was in legal contemplation the act of the President.

In view of the clear and consistent attitude of this court with reference to delegation of presidential duties, slight consideration need be bestowed upon the decisions of other courts.

The delegation of the duty of making even quasi judicial determinations has been upheld in the following cases:

> *In re Way Tai*, 96 Fed. 484, 486.
> *Rainbow* v. *Young*, 161 Fed. 835, 838.
> *Kahn* v. *Garvan*, 263 Fed. 909, 915.
> *Roxford Knitting Co.* v. *Moore*, 265 Fed. 177.
> *John Shillito Co.* v. *McClung*, 51 Fed. 868.
> *Stapleton* v. *Duell*, 17 App. D. C. 575, 583.

In *Porter* v. *Coble* (246 Fed. 244, 249) the question was whether, without consulting the President, the Postmaster General had power to remove Porter, a postmaster of the third class. Under the terms of the act of July 12, 1876 (19 Stat. 78, 80; Comp. St. 7190), such postmasters "may be removed by the President." Judge Smith, after citing *Wilcox* v. *Jackson*, 13 Pet. 498, 513, and *Wolsey* v. *Chapman*, 101 U. S. 755, 769, upheld the validity of the removal on the ground that:

> The President *may have authorized* the Postmaster General to make *removals in his stead when necessary.*
> *Porter* v. *Coble*, 246 Fed. 244, 249.

The doctrine for which we contend is expressed with especial clearness in:

United States v. *Warfield*, 170 Fed. 43, 45.

In re Neagle, 39 Fed. 833, 860 (aff'd 135 U. S. 1).

Hayden v. *U. S.*, 38 Ct. Cls. 39, 50, 51.

The following decisions are also illustrative of the same principle:

In re Huttman, 70 Fed. 699, 702.

Motherwell v. *United States*, 107 Fed. 437, 451, 452; Judge Bradford's views approved on appeal sub nom. *Tucker* v. *Alexandroff*, 183 U. S. 424.

Stegall v. *Thurman*, 175 Fed. 813.

May v. *United States*, 236 Fed. 495, 499.

Ex parte Givins, 262 Fed. 702, 707; affirmed 255 U. S. 11.

M'Collum v. *United States*, 17 Ct. Cls. 92, 101.

Duryea v. *United States*, 17 Ct. Cls. 24.

Maxwell v. *United States*, 49 Ct. Cls. 262, 273.

Hickey v. *Huse*, 56 Me. 493, 495.

In concluding the subject of delegation, one more quotation is, perhaps, permissible. In sustaining the delegability of the duty of making even quasi judicial determinations, the Circuit Court of Appeals for the Second Circuit said:

> "The act of a head of a department is in legal contemplation the act of the President (*Scott* v. *Carew*, 196 U. S. 100, 109, 110). He speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties

Wolsey v. *Chapman*, 101 U. S. 755, 769; *Runkle* v. *United States*, 122 U. S. 543, 557. And as it is impossible that each head of a department should perform in person all the business of his department, the law allows him to act through subordinate agents in his department, whose legal power is included in his, just as his is included in that of the President." (*Roxford Knitting Co.* v. *Moore*, 265 Fed. 177, 190; cert. den. 253 U. S. 498.)

(e) No support is to be found in the legislative history of the 1920 Army reorganization act for the view that section 24b requires personal consideration and action by the President.

On the contrary, the legislative history supports the natural, primary meaning of the statutory language; which is, that the President has a mere *privilege* of acting personally if he chooses.

The Military Affairs Committee of the House of Representatives reported a bill which, if adopted, would have denied both the President and the Secretary of War the right to consider the classification of officers (Report No. 680, Feb. 26, 1920, H. R. 12775). The language of the bill was: "The findings of the" (classification) "board shall not be subject to review *by any authority*" (59 Cong. Rec. Mar. 18, 1920, perm. p. 4289, temp. p. 4606). The House itself, however, amended by requiring action by the Secretary, if appealed to by the officer, but necessarily indicated thereby that no action by the President was to be required or permitted. (59 Cong. Rec. Mar. 13, 1920, perm. pp. 4310–4313, temp. pp. 4626–4628; Mar. 16, 1920, perm. pp.

4400–4411, temp. pp. 4712–4721; especially perm. p. 4411, temp. p. 4721.)

The proceedings and reports in the Senate throw no light upon the question. They make no mention of personal or other action by, or in the name of the President or Secretary, except to the extent of giving the President the right to order a revision after action by the final classification board and of requiring him to convene the preliminary classification board. Language to this effect, which now constitutes the part of the statute under consideration, was included in the original Senate bill (S. 3792, sec. 44), has been retained ever since by the Senate, and was agreed to in conference. The report of the conferees throws no light upon the question (H. R. Rep. No. 1049, May 27, 1920).

See also legislative proceedings affecting the asserted right to a hearing before the honest and faithful board (infra, pp. 104–107).

(f) The reasons assigned by plaintiffs in error for regarding elimination proceedings as judicial in character are unsound.

1. The statement (Brief, p. 18) that the statute specifically provides that the President shall be the convening authority of the court of inquiry and military boards to determine the question of classification and the causes therefor is erroneous. There is only one body which section 24b specifically makes convenable by the President, to wit, the preliminary classification board (sentence 1, supra, p. 7), a board which determines nothing. It is somewhat like a

grand jury, except that the subject matter of its deliberations is unrelated to anything criminal or penal (*In re Nash*, 181 N. W. 570, 572; *Police Com.* v. *Pritchard*, 36 N. J. L. 101; *McCran* v. *Gaul*, 112 Atl. 341, 342, 344, 603, 606). It sits in secret and its action is merely by way of inviting a future hearing and determination of the classification of officers by it tentatively regarded as belonging to class B; unless, indeed, these officers voluntarily accept class B as their proper classification.

2. The President, if he convenes the court of inquiry, the final classification board, or the honest and faithful board, does not thereby necessarily obligate himself to review their action; and where, as in carrying into effect the elimination statute of October 1, 1890, a presidential review *is* required, the duty is delegable to the Secretary of War (*In re Maj. Ewing*, 27 Ops. Atty. Gen. 193, 198).

Military boards, in general, are investigating or advising bodies whose duties are fixed by the convening authority. The officer for whose benefit such boards are really functioning (whether he be the convening authority or a superior of the latter) is not required to review their action, although the nominal convening authority is sometimes so required. In view of the fact that the passage cited from Winthrop, pages 795–822 (Brief of plaintiffs in error, p. 13), has reference exclusively to courts of inquiry, it is assumed that the contention that the convening authority must always review the action of *military boards* is mere inadvertence.

Winthrop's discussion is, however, in point as to courts of inquiry, but he seems to be an authority against relators' contention. He says that there are three principal functions of a court of inquiry; the second of which he states to be that it investigates "for the purpose *simply of informing and advising* the convening official" (Winthrop, Military Law and Precedents, p. 806). The latter would not, of course, be bound to reach any conclusion, or make any determination of his own in a case of this kind. He could use the information or ignore it, as he saw fit. Indeed, he might properly not even read the report or proceedings of the court of inquiry, if his need for the information originally desired had gone by or, for some other reason satisfactory to himself, he regarded the proceedings as no longer worthy of study.

Subsequently, Winthrop, after pointing out that the proceedings in the court of inquiry are not "a trial, but *an investigation merely,*" says in substance under the head "Promulgation" that, in the case of the proceedings and report of an ordinary court of inquiry, the convening authority ought not to publish its report or its result until he should have made a determination of his own with reference to the case, but that he may *omit altogether* to publish the report or result, in which event, apparently, the convening authority is not regarded by Winthrop as under any duty to reach a conclusion of his own or to devote his time to considering or reviewing the case (Winthrop, Military Law and Precedents, p. 820).

The same conception is adopted in the Manual for Courts Martial, par. 472.

Relators' contention also takes no account of the fact that a court of inquiry, convened to act in an elimination proceeding, differs materially from the ordinary court of inquiry. The former is required by statute to *forward* the record of its investigation *to the final classification board* (sentence 5 of sec. 24b, army reorganization act; supra, p. 8), instead of being required, as is the ordinary court of inquiry, to forward the record of its proceedings to the convening authority (A. W. 103; 41 Stat. 807). The court of inquiry functioning under section 24b is also unlike the ordinary court of inquiry in not being limited to the investigation of particular transactions, accusations, or imputations. (A. W. 97.)

3. Plaintiffs in error are grasping at a straw when they assert (Brief, p. 15) that Congress must have deemed elimination to be a judicial proceeding because courts of inquiry and military boards are "tribunals" or bodies of "judicial character."

The fact is that there is no military tribunal in any proper sense, except the court-martial. The utmost that can be said for a court of inquiry is that its procedure is almost the same as that of a court-martial, and that in gaining information, it has a good part of the powers of a court-martial.

Winthrop says:

> "The court of inquiry, so called, is really not a court at all. . . . Its proceedings are not a trial, nor is its opinion (when it ex-

presses one) a judgment. It does not administer justice and is not sworn to do so, but simply to examine and inquire. It is thus not a court, but rather a board . . . of investigation."

Military Law and Precedents, p. 797.

Winthrop quotes (p. 797) the following very accurate definition of the nature of a court of inquiry:

"A court of inquiry has no judicial power and is, in strictness, not a court at all, but an assembly of persons directed by the commanding officer to collect evidence with respect to a transaction into which he cannot conveniently himself make inquiry."

British Rules of Procedure, 123(D).

So, too, the Judge Advocate General (1912 Digest Ops. p. 178) says that a Court of inquiry is not a court, but rather a board.

The matter should, however, be deemed set at rest by the Manual for Courts Martial, par. 461, which, being an Army regulation promulgated as such by President Wilson (Executive Order of 17 December 1920), pursuant to the authority conferred upon him by Congress in Article of War 38, has the force of law (see *In re Brodie*, 128 Fed. 665, 669). This reads:

"A court of inquiry is *not* really *a court in the judicial sense* of the term, for no criminal issue is formed before it; it arraigns no accused, receives no plea, makes no findings of guilt or innocence, awards no punishment." (C. M. M. 461.)

The court of inquiry may or may not make recommendations or express opinions; normally it does

not do so (A. W. 102). Whether or not the court of inquiry makes a recommendation or expresses an opinion, it never makes (judicial, quasi judicial, or other) decisions or determinations in any proper sense. Although styled a court because of its using quasi judicial procedure, it is not a court in fact. As was said by Attorney General Moody, afterwards a justice of this Court, a court of inquiry does not "perform any real judicial function." (25 Ops. Atty. Gen. 623, 625.)

Military boards do not require consideration in this connection, as their resemblance to anything judicial is still more remote than that of courts of inquiry.

II.

THE VALIDITY AND EFFECTIVENESS OF THE ELIMINATIONS OF PLAINTIFFS IN ERROR ARE NOT IMPAIRED BY ANY DEFECT IN THE MATTER OF ACCORDING THEM ESSENTIAL HEARINGS.

This point relates only to Col. Creary's not having been given a hearing by the honest and faithful board; for the action of the honest and faithful board was favorable to Col. French and it is now conceded that the hearings elsewhere were sufficient as to both relators.

A

NO HEARING BEFORE THE HONEST AND FAITHFUL BOARD UPON THE QUESTION OF WHETHER OFFICERS, CLASSIFIED IN CLASS B, HAVE BEEN SO CLASSIFIED BECAUSE OF NEGLIGENCE, MISCONDUCT, OR AVOIDABLE HABITS, IS ESSENTIAL TO THE VALIDITY OF AN ORDER DISCHARGING THEM.

Upon this much-contested subject, it is submitted that the following principles are now established in

the Federal courts and in the great majority of other jurisdictions.

Where a specified fact or condition or course of conduct of a discreditable or disqualifying nature is specifically stated by statute as the cause of removal of a nonmilitary officer, the existence of the disqualifying fact is to be regarded as a condition precedent to the right of removal under such statute and the essential fact necessary to satisfy the condition must be ascertained by the removing authority through notifying the officer concerned, giving him an opportunity to prepare and present his defense and according him a hearing; unless the right to a hearing is dispensed with by the statute, either expressly or impliedly. In other words, if the legislature pass a statute of the character just mentioned, a legislative intention to require a hearing is to be implied by construction, in the absence of express statutory language on the subject.

On the other hand, no notice or hearing is to be deemed a condition precedent to the right of removal in case the statute authorizes removal without cause or for cause without particularly defining the cause. (*Ayers* v. *Hatch*, 175 Mass. 489; 56 N. E. 612, 613.) Moreover, in case the legislature authorize removal for specified causes, which are not ascertainable facts or conditions, but which are matters of opinion, no notice or hearing is necessary. Cases of this kind are presented when the legislature authorizes removal in the event that the incumbent of office is "unfit for the discharge of his duties" or when the

legislature specifically defines the causes of removal, which amount to facts or conditions, but provides further that the removal is to be had only where the facts or conditions in question are made to appear to the satisfaction of the removing officer (*State* v. *Crandall*, 269 Mo. 44; 190 S. W. 889, 891, 893).

Where, therefore, the statute, instead of *defining* a fact or a condition, the existence whereof is intended to justify removal, the statute merely authorizes removal "for good and sufficient cause," no notice or hearing will be regarded as impliedly required by the legislative intent (*Hertel* v. *Boismenue*, 229 Ill. 474; 82 N. E. 298).

(a) The general principles governing removal of officers must be applied with caution when dealing with the exceptional situation which is regulated by section 24b of the Reorganization Act.

Eliminations under the present Reorganization Act ought to be governed by the principles enunciated by this court in dealing with the effect of the previous Army elimination acts (supra, pp. 16, 19; infra, pp. 97–103) rather than those dealing with the effect of nonmilitary removal acts. The controlling principle in construing these elimination acts is one based on the manifest general purpose of Congress to raise the standard of efficiency of the Army or to reduce the commissioned personnel to the number which accords with the changed condition of the country. In their specific provisions, these acts should be so interpreted as to promote this general purpose, in so far as this may be done without doing violence to the statutory language.

Moreover, such construction should take account of the fact that the tenure of office of a military officer is insecure to a degree otherwise unknown. It is, in the language of the Court of Claims, the "frailest known to the law" (*Street* v. *U. S.*, 24 Ct. Cls. 230, 247), and the fundamental relation now existing between the Government and the officer, and which has always existed in this country, is that his incumbency of his office is solely "during the pleasure of the President of the United States" for the time being.

From these characteristics of military office, two deductions are deemed legitimate and sound, to wit:

(1) Any removal of a military officer by the President is to be deemed valid under the President's inherent power to remove without cause, irrespective of the provisions of section 24b (infra, p. 111); and (2) mere failure of the legislative body to give any indication of its will, in respect of a hearing, does not necessarily raise a presumption of legislative intent to grant a hearing before removal, even in cases where the authorized removal is for cause; but, as regards legislation which, like section 24b, seeks to raise the standard of efficiency of military officers in any particular grade or to diminish the number of officers to be supported at public expense, such failure to indicate the legislative will raises the contrary presumption. *Reaves* v. *Ainsworth*, 219 U. S. 296 (see infra, p. 97; supra, p. 17).

of the hearing or *hearings* which it has deemed necessary, before permitting an officer's status under that section to be altered, Congress has necessarily *covered the entire field* of providing for hearings and has said by implication that there may be no other hearing than that which Congress has required.

In successive sentences, Congress has directed the creation of four bodies of administrative officers to consider, on the one hand, the welfare of the Army and, on the other hand, justice to its officers. It has significantly provided that before *one* of these boards, to wit, the court of inquiry, there shall be a hearing accorded to the officer concerned, after notice and opportunity to prepare his case, irrespective of what the scope of the hearing was intended to be. If Congress had intended to require a hearing before any other of these four bodies, Congress would have said so expressly or at least unmistakably.

2. On the point just stated, the court said in *State ex rel. Brandt* v. *Thompson*, 91 Minn. 279; 97 N. W. 887:

> The subject of removal of all officers is within legislative control, and where that body prescribes a manner and method of removal, it is exclusive.

For the courts to require *two* hearings under section 24b would be violative of this principle and would be, in effect, an encroachment upon the legislative functions.

Substantially the same reasoning as is here invoked was applied by the court in *Hamilton* v. *Grant*, 14 Wyo. 41. In that case, the court said:

> "Having conferred the power" (of removal) "upon the governor in language which is plenary, it adds: 'Provided reason for such removal shall be filed in the office of the Secretary of State, in writing, subject to inspection by any person interested'—thereby declaring the express conditions and limitations under which the governor may act. Having entered upon the realm of limitation, the enumeration of one condition precludes the idea that there should be others not expressed. *Expressio unius est exclusio alterius.* To our minds the language of the proviso is inconsistent with the idea of a hearing."
>
> *State ex rel. Hamilton* v. *Grant*, 14 Wyo. 41; 81 Pac. 795, 797, 798, 799.

The same useful principle of "expressio unius" also furnished the *ratio decidendi* in *People* v. *Draper*, in which the court said:

> We have, therefore, on the one hand, the legislature, at about the same time under the same conditions, explicitly providing for a trial in case of removal of members of boards of education; while, on the other hand, as to school commissioners and other school officers, such a provision is not added. It may be fairly said, after an examination of these provisions, that the legislature, having full knowledge of the condition of affairs that existed in the State of New York, intended, in that class of cases, that no notice or opportunity of defense should be given. * * * In *People ex rel. Clingan* v. *Draper*, 63 Hun. 389, 18 N. Y. Supp. 282, the removal of a school trustee was sustained though no

hearing had been accorded him, although, upon relator's brief, that was strongly urged as in violation of his rights. The court, under these authorities finds no difficulty in holding that the omission in section 338 of express provisions for notice and hearing contained in section 228 was intentional, and that the relator was not entitled as a matter of right to notice of, or a hearing.

People v. *Draper*, 124 N. Y. Supp. 758, 762, 764.

In the case of *State* v. *Burke*, 8 Wash. 412 (36 Pac. 281, 284), the ordinary inference that in removals authorized for "misconduct in office" a hearing is intended was rebutted by other, similar indications of legislative intent, found in the text of the statute.

In *State on inf. Barker, Atty. Gen.* v. *Crandall*, 269 Mo. 44 (190 S. W. 889, 891, 893), removal of a police commissioner, under a statute authorizing removals for "official misconduct," was sustained as valid, notwithstanding absence of notice or hearing, primarily on the ground that the statutory language (R. S. 8770) required the removing authority to be "fully satisfied" of the misconduct and thus indicated a legislative intent not to require a hearing (see especially opinion of Blair, J). But the rule of *expressio unius* was also relied on as supporting the view that the unexpressed intent of the statute was to dispense with a hearing because, in a different removal provision of the same statute, the intent to require a hearing was expressed. Judge Bond said (190 S. W. at 890):

> "The legislature made a wholly different provision in dealing with the power of the police commissioners to remove members of the police force and permitted that to be exercised only 'for cause *after a hearing* by the board.' R. S. 8773."

3. The leading authority on military removals is, no doubt, *Reaves* v. *Ainsworth*, 219 U. S. 296, in which the elimination from the Army of Lieut. Reaves, although he was denied the essentials of a hearing, was sustained as valid under the act of October 1, 1890 (26 Stat. 562).

Plaintiffs in error challenge the controlling effect of the Reaves case, in constraining a decision here that Col. Creary was not entitled to a better hearing than that which he received, by contending that the act of 1890 "was one which authorized the President to establish a system of examination for promotion, not removal from office for specified cause" (Brief, p. 14). A perusal of the statute, however, will show that it *did* authorize removals for specified causes.

Section 1 of the act recognizes the general rule of promotion by seniority. Section 2 deals with the nature of military commissions. Section 3 authorizes the President "to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion" and expressly gives the President unlimited discretion as to how long before the time for promotion, the question of their fitness for promotion shall be determined. In the remainder of this section, provision is made for those whose fitness for

promotion is determined adversely, to wit, that those who are unfit, for one rather limited *cause* specified in the statute, shall be retired in an advanced grade, while those who are found unfit for any other cause shall be discharged. The statutory language, pertinent upon the causes for elimination on the basis either of retirement or discharge, is as follows; all of it limited, however, to cases in which, upon his first examination, "any officer fails to pass a satisfactory examination and is reported unfit for promotion":

> "Should the officer fail in his physical examination and be found incapacitated for service *by reason of physical disability contracted in line of duty*, he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should fail *for any other reason*, he shall be suspended from promotion for one year, when he shall be reexamined, and in case of failure on such reexamination" (to establish his fitness for promotion or, probably, to establish unfitness due to physical disability contracted in line of duty, *In re Maj. Ewing*, 27 Ops. Atty. Gen. 193) "he shall be honorably discharged, with one year's pay, from the Army."
>
> 26 Stat. 562.

This language is followed by a proviso which accords special treatment to those who, during the War of the Rebellion, were officers of the volunteers or militia or who received their appointments to the Army direct from civil life. As to these, the act provides that the presidential examining boards

shall be composed entirely of officers of the same class (ex-volunteers, ex-militia, etc.) and that the examination, while including, of course, their "fitness for practical service," shall exclude any testing of "technical and scientific knowledge." By an amendment to the act, however (act of July 27, 1892; 27 Stat. 276), officers entitled to this special treatment were empowered to waive it and subject themselves to the same "technical and scientific" examination, by the same examining boards as officers who had entered the Army from West Point.

There are important differences between the act of Oct. 1, 1890, and the act under which these plaintiffs in error were eliminated from the Army, in the matter of procedure. The former act, except in requiring examining boards and, as to one class of cases, in making provision for the character of personnel of such boards, left the matter of procedure entirely to the President, whereas the act of 1920 prescribed the procedure in certain important particulars. But the main purpose to be accomplished by the two acts is the same, to wit, the elimination of the unfit from the active list and their treatment after elimination, according to the *cause*, in virtue of which, they are found to be unfit; (1) eliminations due to causes consistent with their deserving the gratitude of the country being accomplished, under both acts, through retirement and (2) eliminations due to causes less likely to involve their meriting such gratitude being accomplished, under both acts, through discharge. Of the act of 1890, this court has said: "Its purpose

is to secure *efficiency* in those who are to be active in service" (naturally by eliminating those who are inefficient and do not succeed, upon a second examination, following the first by a year's time, in making themselves efficient), "and physical capacity, of course, is as necessary as mental capacity."

Reaves v. Ainsworth, 219 U. S. 296, 305.

The Act of October 1, 1890, was, no doubt, a promotion statute, as plaintiffs in error point out; but the changes in the preexisting system of *promotions* were unimportant, in comparison with the important requirement for the *elimination* of officers by retirement or discharge. It was an elimination statute even more than a promotion statute. Aside from the matter of procedure, there are two salient differences between these two elimination statutes.

(1) The promotion-or-elimination act of 1890 made elimination the consequence of *unfitness for promotion*, that is, for active service in the higher grade. This was construed by the War Department to involve deferring the elimination of an officer, found unfit, until the time when, if fit, he would have been promoted. (G. O. 128, W. D. Oct. 29, 1890, par. IX.) The elimination statute of 1920 (section 24b of the act of June 4), on the other hand, required elimination of those *unfit to continue* to serve *in their existing grades.*

(2) The act of 1890 was less liberal in giving eliminated officers the benefit of retirement than is the act of 1920. Every cause of elimination which, under the former, would lead to retirement leads also to

retirement under the latter; for "physical disability", if "contracted in line of duty" (act of 1890), could scarcely be due to his "neglect, misconduct, or avoidable habits" (act of 1920). 32 Ops. Atty. Gen. 12; *Reaves* v. *Ainsworth*, 219 U. S. at 305; *Steinmetz* v. *U. S.*, 33 Ct. Cls. 404, 410. Certain causes of elimination, however, which under the act of 1920 would lead to retirement, led to discharge under the act of 1890. One of these was unfitness due solely to non-culpable, professional deficiencies (*In re Ewing*, 27 Ops. Atty. Gen. 193).

The following four causes of elimination required determination under the act of 1890, as construed, rightly, no doubt, by General Orders No. 128, W. D., October 29, 1890, Par. II: (*a*) Physical disability contracted in line of duty, (*b*) physical disability contracted otherwise than in line of duty, (*c*) professional or mental unfitness or inefficiency, and (*d*) moral defects or an insufficiently good character.

Elimination by retirement was required by the statute for cause (*a*), whereas elimination by discharge was required for causes (*b*), (*c*), and (*d*).

This, then, was the nature of the promotion-or-elimination act, under the terms of which, Lieut. Reaves claimed that he was entitled to a hearing before elimination and particularly that, if eliminated, he ought to have been retired, instead of being discharged. Reaves was, in fact, given nothing more than the pretense of a hearing before the examining board, whose proceedings of August 21, 1905, constituted the basis of the order discharging him from the

service of the United States for cause (*c*) of the causes stated above. This court said (219 U. S. at 300, 302):

> "The board convened at Fort Monroe August 21, 1905, and he" (Reaves) "appeared before it pursuant to orders. He was found physically fit for duty. He failed, however, in his mental examination. * * * He presented the names of about thirty witnesses. * * * Plaintiff in error" (Reaves) "was not allowed to call witnesses, nor to inspect exhibits presented to the board, nor to cross-examine the surgeons on their report."

The court, at page 304, referred to the provisions of R. S. 1248 conferring upon retiring boards "such powers of a court-martial and of a court of inquiry as may be necessary;" and at page 305, it referred to the provisions of the act of October 1, 1890, relating to retirement for one particular statutory cause and quoted certain of the more detailed provisions found in G. O. No. 128, W. D., October 29, 1890, referred to above and relating to the same subject. It then continued:

> "If it be disputable whether these provisions guarantee to an officer 'the safeguards of a trial in court,' it is certain that the decision is not final with the board. * * * If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion, * * * such intention would have been explicitly declared."
>
> *Reaves* v. *Ainsworth*, 219 U. S. 296, 306.

The proceedings of the examining board and the action thereon of superior authority were therefore held not open to attack by Reaves, despite the denial of a hearing and despite the fact that the discharge was for cause.

4. The construction which the War Department has placed upon section 24b, and has applied to Colonel Creary and Colonel French is one under which no hearing is accorded to an officer before the honest and faithful board, but only before the court of inquiry. Unless clearly wrong, this construction should prevail. For, as has so often been said:

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."
>
> *United States* v. *Moore*, 95 U. S. 760, 763.
>
> *Edwards* v. *Darby*, 12 Wheat. 207, 210.
>
> *Hastings Railroad* v. *Whitney*, 132 U. S. 357, 366
>
> *Boston & M. Railroad* v. *Hooker*, 233 U. S. 97, 117, 118.
>
> *La Roque* v. *United States*, 239 U. S. 62, 64.

This principle applies with peculiar force in cases in which officers and soldiers are attacking, in the courts, acts of their military superiors in the organization or control of the Army. For in these cases, judicial annulment or condemnation of the action of the military authorities is necessarily, to some extent, prejudicial to military discipline.

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On this subject, the New York Court of Appeals has said:

> "To compel the superintendent or warden * * * to reinstate, against his judgment, a discharged keeper or guard, would introduce into prison management a most mischievous principle. It might, and probably would, produce great demoralization, and tend to the destruction of all order and discipline. It would have much the same effect upon prison discipline, though perhaps in a less degree, that it would have upon *military discipline* if appointments and removals in the Army were to be regulated by writ of mandamus."
>
> *People ex rel. Griffin* v. *Lathrop*, 142 N. Y. 113, 116; 36 N. E. 805, 806.

See also:

> *White* v. *Berry*, 171 U. S. 366, 378.
> *Reaves* v. *Ainsworth*, 219 U. S. 296, 306.

The decisions which plaintiffs in error have cited (Brief, p. 17) are not relevant to any controverted question. Those most nearly in point are illustrations of the conceded proposition that where a statute authorizing the removal of nonmilitary officers for causes specified therein, affords no indication of legislative intent as to whether such officers shall be accorded a hearing before removal, the intent to accord a hearing is to be implied.

(c) The legislative history of the reorganization act shows that no hearing before the honest and faithful board was intended.

The reorganization bill, as it originally passed the House of Representatives (H. R. 12775), was silent

as to any hearing before the honest and faithful board. It provided, however, that an officer should have a hearing (if he desied one) before the classification board with reference to the subject of classification only, with a right to appeal to the Secretary of War from its findings.

This bill was transmitted to the Senate and referred March 22, 1920, to its Committee on Military Affairs. After being reported, it was amended by the Senate and passed April 20, 1920. The Senate manifested its dissatisfaction with the omission of the House bill to make express provision for a hearing before the honest and faithful board; for it insisted upon an amendment providing for such hearing. As amended by the Senate, the provision read:

> "Whenever an officer is placed in Class "C" (the Senate equivalent of what was denominated class B in the House bill and in the final statute) "a board of not less than three officers shall be convened by the Secretary of War to determine if his service has been honest and faithful. The officer concerned *shall be given a hearing by this board* and in general shall have the rights of an officer being tried by a court-martial."

Section 44 of H. R. 12775, as amended and passed April 20, 1920, by Senate.

The bill then went to conference. What discussion took place there, as between the Senate plan of giving a hearing before the honest and faithful board and the House plan of making no such provision for a hearing, is not referred to in the conference report. All that is known is that the House

conferees prevailed and the Senate conferees receded on this point. The Senate ratified the action of its conferees in abandoning the amendment which previously it had insisted on, and the bill became law, without any provision for a hearing before the honest and faithful board.

The only inference which a court is justified in drawing from this legislative history is that the House of Representatives and its conferees were unwilling to permit the War Department to be harassed by two hearings and insisted that all issues which might properly be the subject of hearings should be disposed of at one hearing, to wit, a hearing before the court of inquiry.

Plaintiffs in error are quite right in their assertion that the Senate committee in its report (No. 400, 66th Cong., 2d sess.) explained that the bill which it was then reporting provided for a hearing before the honest and faithful board. The text so reported was identical with that quoted above as part of section 44. The plan of hearings thus advocated, however, was considered and rejected by the House and never became law.

Other statements made by plaintiffs in error as to the contents of committee reports appear to be without foundation. (See report of Committee on Military Affairs of House of Representatives, Feb. 26, 1920; Report No. 680, p. 11.)

The debates in Congress to which reference is made by plaintiffs in error go no further than to express individual opinions to the effect that (somewhere

and at some time) officers' interests should be protected through proper hearings. No remarks have been discovered on (temp.) pages 4626, 4629, 4712–4724 of the Congressional Record, cited by relators, or elsewhere, wherein the speaker insisted that the hearing, which he advocated, should be before the honest and faithful board or elsewhere than before the body which was to take the evidence on the subject of classification. Moreover, such debates cannot properly influence the judicial construction of a statute. *Lapina* v. *Williams*, 232 U. S. 78, 90.

It may be added that, as appears in 59 Cong. Rec., perm. p. 4289, temp. p. 4606, Mr. Kahn had charge of the bill on the floor of the House on behalf of the committee, not Mr. Greene, as asserted by plaintiffs in error.

See also legislative proceedings affecting the President's right to delegate his functions, if any, under section 24b (supra, pp. 82, 83).

B.

IF THE STATUTE REQUIRES A HEARING UPON THE QUESTION OF WHETHER OFFICERS, CLASSIFIED IN CLASS B, HAVE BEEN SO CLASSIFIED BECAUSE OF NEGLECT, MISCONDUCT, OR AVOIDABLE HABITS, THE REQUIRED HEARING HAS BEEN HAD.

If there be any such required hearing (contrary to what has been contended, supra, in heading "A"), it must be on the theory that Congress intended a hearing upon every issue of importance to the officer concerned and that it seems inconsistent and unjust to require a hearing upon the issue of fitness and to make no similar requirement upon the issue of misconduct, etc.

Whatever the reasoning may be, the very grounds upon which a hearing upon the issue of misconduct may be deemed to have been within the congressional intent compel the acceptance of the view that the hearing, the one hearing which Congress has provided for in so many words, was intended by Congress to subserve the entire congressional purpose: that is, that such hearing was intended to embrace within its scope the issue as to misconduct, as well as the issue as to fitness.

Referring to the language of section 24b, it is found that there is not the slightest indication of the intended scope of the investigation or hearing before the court of inquiry, unless such indication be found in the circumstance that Congress made provision for the hearing in the court of inquiry at an earlier point in section 24b (viz, sentences 3 and 4) than that at which provision is made for the determination of the issue of misconduct (sentence 6). It seems more probable, notwithstanding this circumstance, that Congress intended all issues to be the subject of the hearing before the court of inquiry rather than that (1) the issue of misconduct was not to be the subject of any hearing at all or, if it was, (2) that the House of Representatives thwarted its own purpose, when it refused to concur in the Senate amendment to its original bill, which amendment would have given a hearing on misconduct before the honest and faithful board.

Before the court of inquiry, Col. Creary had the right in person or by counsel to cross-examine

witnesses, to adduce testimony, to submit oral and written argument, all of which was faithfully reported to the final classification board and subsequently to "the honest and faithful board." It is hardly supposed that counsel contend for a right either to repeat before both of these boards the testimony given before the court of inquiry or to call new witnesses whom the officer did not see fit to summon before the court of inquiry. If our view on this point is right, all that he has been deprived of is the privilege of personal appearance and of oral argument. Does any case go the length of holding that where there has been a full opportunity to cross-examine, to present testimony, to submit argument before an inferior officer or body (all to be reported, for consideration by a superior officer or body), an adequate hearing has been denied, merely because personal appearance and oral argument before the superior officer or body are denied? The authorities are all to the contrary.

The hearing before the court of inquiry, being unlimited in scope, necessarily includes any and every fact and circumstance, favorable or unfavorable, whether relating to capacity, ability, efficiency, misconduct, neglect, or disqualifying habits, and any other thing or fact appearing in an officer's record that affects the question whether he should or should not be retained in the service.

His opportunity for full and complete defense before a tribunal is here afforded, to go into the entire question at issue, viz, "Should I be retained

in the service; and if not, what shall become of me?" The justice of the classification being admittedly in issue, its cause (which is in practice inseparable therefrom) is necessarily in issue also. The officer under inquiry is put upon his notice as to everything which may affect his status in the Army. If the record upon which the provisional classification is based contains nothing which spells misconduct, etc., he then knows that he is not required to defend against any such situation; for no new fact or record can be injected into any case (nor has any been injected into the cases of these relators) without notice and opportunity to meet it, by proofs before the court of inquiry. If, on the other hand, the record does contain matter of this nature, he then knows what is held against him, and he has his opportunity to rebut it.

C.

THE DISCHARGE OF COL. CREARY FROM THE ARMY WAS VALID AND EFFECTIVE, EVEN IF NO OPPORTUNITY WAS ACCORDED HIM FOR A HEARING ON THE ISSUE OF MISCONDUCT.

Point A was devoted to showing primarily that no hearing before the honest and faithful board was required by section 24b, for that fact of itself is enough to support the judgment below as against the attack based on alleged want of hearing.

It was shown incidentally, however, that no hearing, on any subject or before any body, should be deemed required by the statute, except that which its language plainly requires; and this, it must be conceded, has been had. Point B alone, if well taken, would also be sufficient to support the judg-

ment below. It is confidently believed that the present point will not require consideration.

It is nevertheless true that even if (contrary to our contentions) section 24b did require a hearing on the issue of misconduct and no opportunity for such a hearing was afforded, still the discharge of Col. Creary must be held valid on grounds unconnected with section 24b.

(a) The proceedings under section 24b may, if necessary, be treated as superfluous and Col. Creary's discharge sustained as an exercise of the President's fundamental power to remove officers appointed by him.

The power to remove, as an incident of the power to appoint, is well established.

> *Burnap* v. *United States*, 252 U. S. 512, 515, and cases cited.

It is, however, conceded that where (under Const., Art. II, sec. 2, clause 2) Congress has, by statute, conferred the power of appointment in a given case upon the head of a department *virtute officii*, Congress may also limit or deny the correlative right of removal; for "the head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress." (*Perkins* v. *U. S.*, 20 Ct. Cls. 438, 444; affirmed 116 U. S. 483; see also *Burnap* v. *U. S.*, 252 U. S. 512, 515.)

Nevertheless removals from office, by authority of the President, of persons appointed by the President, stand upon a different footing; and this court has repeatedly refused to sanction the view that Congress

has constitutional power to limit or deny the President's right of summary removal from office.

U. S. v. *Parsons*, 167 U. S. 324, 334, 335.
United States v. *Perkins*, 116 U. S. 483, 484.

But even if, in enacting section 24b, Congress might constitutionally have limited the President's power to remove Army officers summarily, it has given no sufficient expression of legislative will in that regard. For a statutory specification of the causes of removal is not to be construed as an attempted limitation upon the power of summary removal.

Shurtleff v. *U. S.*, 189 U. S. 311, 315, 316.
Blake v. *U. S.*, 103 U. S. 227, 234, 235.

The fact that ineffectual steps toward the removal of an officer for cause have been taken does not justify the latter in bringing mandamus or prohibition, where the removing authority has a concurrent right of summary removal.

Conwell v. *Village of Culdesac*, 13 Idaho 575; 92 Pac. 535.

If, on the other hand, it be said that the President did not exercise his power of summary removal, because section 24b was recited in the order of discharge (Creary Rec. p. 12), the answer is that *if* a right of hearing conferred by section 24b was denied, such recital must be treated as surplusage. For, as was said by Mr. Justice Peckham in *Shurtleff* v. *United States*, 189 U. S. 311, 314:

> "It must be presumed that the President did not make the removal for any cause assigned in the statute, because there was given

to the officer no notice or opportunity to defend."

(b) Col. Creary's discharge was also justified by the 118th article of war.

The statute referred to (A. W. 118; 41 Stat. 811) in substance authorizes officers to be discharged or dismissed, in time of war, "by order of the President or by sentence of a general court-martial."

Wallace v. *United States*, 55 Ct. Cls. 396, 404; affirmed by this court Feb. 27, 1922, on other grounds.

The discharge of Col. Creary November 17, 1920, was in time of war; for the war with Germany and Austria did not end before March 3, 1921. (Joint resolution of March 3, 1921; 41 Stat. 1359.)

Ex parte Sichofsky, 273 Fed. 694, 696.

The power of discharge conferred by this statute is certainly concurrent with that provided for in section 24b, as both powers are included in the same act of Congress.

III.

EVEN WERE THE ELIMINATION PROCEEDINGS FATALLY DEFECTIVE, THERE IS NO REMEDY BY WAY OF MANDAMUS.

It is manifest upon the slightest perusal of section 24b, and it is indeed conceded, that the eliminations therein provided for involve an exercise of the authority of the presidential office and not of that of the Secretary of War *virtute officii*. The latter is nowhere mentioned or referred to in the elimination section, except in the latter part, and there, only with refer-

ence to acts to be done after the elimination is completed. But the courts have no jurisdiction over the President by way of mandamus; and mandamus can not lie against the Secretary to coerce an act, in the absence of some duty to perform it, imposed upon him by law *virtute officii*.

Moreover, any defects due to nonconformity with a statute, the meaning of which is fairly debatable, are not remediable through the drastic and summary writ of mandamus. Furthermore, the offices claimed by plaintiffs in error have expired by lapse of time, since these actions were begun, and there is now nothing upon which mandamus can operate.

A.

THE COURT OF APPEALS WAS RIGHT IN HOLDING THAT THE ELIMINATION OF PLAINTIFFS IN ERROR, BEING BY PRESIDENTIAL ORDER, CAN NOT BE CALLED IN QUESTION UPON MANDAMUS.

The Court of Appeals, referring to the function of making the final determination, in respect of eliminations from the Army and to effectuating that determination by an appropriate order, used the following language:

> "The President may, of course, perform this function personally, or, as in this instance, he may delegate it to the Secretary of War. But, in either case, it is an administrative order of the President and, as such, must be vacated as a condition precedent to reinstatement under the writ. But this can not be accomplished in this proceeding, since the executive and administrative action of the President can not be controlled by mandamus" (citing *Marbury*

v. *Madison*, 1 Cranch, 137, and *Mississippi* v. *Johnson*, 4 Wall. 475).

Creary Rec., pp. 68, 69.

Weeks v. *Creary*, 277 Fed. 594, 599.

That the President is not subject to mandamus is, of course, well settled.

Kendall v. *U. S. ex rel. Stokes*, 12 Pet. 524, 608, 610.

Hawkins v. *Governor*, 1 Ark. 570; 33 Am. Dec. 346.

The decision made in the present cases by the Court of Appeals involves an application of a principle which that court had had occasion to recognize in several previous cases.

In *Brown* v. *Root*, 18 App. D. C. 239, Lieut. Brown had been tried by court-martial for a military offense and acquitted. Some weeks later he was tried again for the same offense, sentenced to be dismissed from the service, and dismissed. Subsequently, Brown brought mandamus against Secretary of War Root, alleging nullity of his sentence and dismissal, and asking, in effect, that the Secretary be required to vacate the invalid order of dismissal and to discharge the relator or muster him out of the service honorably, in pursuance of a general order for the mustering out of his regiment, which order was then in force. The court held in effect that, since the Secretary could only act, if at all, in virtue of delegated presidential authority and not as Secretary *virtute officii*, he was not subject to the control of the court by way of mandamus. The court said:

"Without regard to any question of * * * the invalidity of the conviction and sentence

> thereafter for the same offense, the judgment dismissing the relator's petition must be affirmed. * * * Whether, notwithstanding the final action of the court-martial and of the general in immediate command, the relator was entitled to be treated as still in the service * * * was *a question for the President* to determine, in accordance with his duty. The Secretary of War, no matter what powers he may in fact exercise in such matters, is the representative and agent of the President, whose will is executed. As was said of the duties of the Secretary of State, under analogous circumstances, in *Marbury* v. *Madison:* 'He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.' (1 Cranch, 137, 167.)"
>
> *Brown* v. *Root*, 18 App. D. C. 239, 241, 242.

In *Holzendorf* v. *Hay*, 20 App. D. C. 576, 580, a petition for mandamus against the Secretary of State to compel presentation of an international claim was dismissed primarily because the action sought to be coerced was political rather than ministerial. The court nevertheless said:

> "The powers of that department are vested in the President, * * * notwithstanding he may habitually act through the agency of the Secretary of State appointed for that purpose. * * * To coerce the action of the Secretary, therefore, is to attempt the coercion of the President."

In *Ray* v. *Garrison*, 42 App. D. C. 34, it was sought to coerce the Secretary of War, not by mandamus,

but by the analogous (*Pullman Co.* v. *Croom*, 231 U. S. 571, 576; *Darlington* v. *Lane*, 46 App. D. C. 465, 479; *Moore* v. *Heany*, 34 App. D. C. 38) remedy of injunction. The plaintiff, Ray, feared prejudicial action by the Secretary, depriving him of rights conferred upon him by the promotion act of October 1, 1890. Said the court:

> "No duty is imposed upon the" (Secretary of War) "in respect to the execution of the act in question. * * * Where, however, no such duty is imposed, there is no real justification for judicial interference. An attempt to invoke judicial interference in such a case is in effect an attempt to reach the executive" (i. e. the President) "through his representative, which may not be done." (42 App. D. C. at 38.)

The acts of any Federal executive officer inferior to the President are divisible into two great classes, to wit: (1) Acts with the performance of which, such officer is directly chargeable *virtute officii* by the Constitution or by statute, either expressly or by necessary implication, and (2) acts which he is properly required to perform for some superior officer, in virtue of authority committed by law to such superior and by him delegated to the inferior officer in question; the latter having, therefore, no independent duty in the premises.

In the one case, the officer's responsibility is primarily to the Nation and his action, if ministerial and not discretionary, may be coerced judicially; but his action is effective, if at all, *ex proprio vigore* and is

unaffected (except as the statute may otherwise provide) by the approval or disapproval of his executive superiors. *Eberlein* v. *U. S.*, Opinion November 7, 1921, by Mr. Justice Day. In the other case, his responsibility is primarily to his superior officer and he is not subject to like judicial coercion, unless disobedient to the superior.

The two classes of acts, with special reference to acts performed by the Secretary of State (1) *virtute officii* and (2) for the President by delegated authority, are clearly distinguished by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch, 137, 158, 166. The acts of the Secretary of State in affixing seals to, and recording civil commissions, which were expressly required of him by the statute of Sept. 15, 1789 (1 Stat. 68), and his delivering of them, which was impliedly required of him thereby, were deemed duties *virtute officii*, performed independently and not "by the instructions of the President" (p. 158) and for which he was, in general, "amenable to the laws" and the courts "for his conduct" (p. 166); whereas, in respect of acts authorized by the statute of July 27, 1789 (1 Stat. 28, 29), which was entirely analogous to R. S. 216 (supra p. 68), the Secretary "is to conform precisely to the will of the President," and his acts "can never be examinable by the courts" (p. 166).

A similar distinction was recognized in England in *Queen* v. *Lords of the Treasury*, L. R. 7 Q. B. 387, 394, 398. The action was for mandamus to compel payment of certain taxed costs of public prosecuting

officers. Although the duty of payment was admitted to be purely ministerial, mandamus was refused on the ground that the duty was not one imposed upon the cabinet officers in question *virtute officii*, but rather as agents of the Crown. Said Chief Justice Cockburn (at p. 394):

> "Therefore the question comes to be whether the Lords Commissioners of the Treasury, when this money gets into their hands, are bound to apply it as the servants of the Crown or as the servants of Parliament who vote the money. * * * The money is voted by Parliament as a supply to the Crown" (no *direct* responsibility being cast by statute upon the lords).

In the same case, Lord Blackburn said (at p. 398):

> The general principle, not merely applicable to mandamus, but running through all the law, is, that where an obligation is cast upon the principal and not upon the servant, we can not enforce it against the servant. * * * Mr. Gorst argued with great ingenuity that the effect of the act (29 and 30 Vict. c. 39) was in fact to cast a duty upon the Lords of the Treasury; but I am unable to see that the sections amount to anything more than this, that Her Majesty, to whom the money was granted in law, is to administer it according to the advice of her responsible advisers. * * * It seems to me that this obligation, such as it is, is upon Her Majesty, to be discharged through her servants.

The same distinction pervades the entire opinion of this court in *Butterworth* v. *U. S. ex rel. Hoe*, 112 U. S. 50, 56. Mr. Justice Matthews points out the

necessity in some cases for "critical attention" being "given to the language of the statutes defining the jurisdiction of the chief and his subordinates and the special relation of subordination between them respectively;" that relation varying from "mere obedience to direction" of the chief, on the one hand, to cases where "the action of the officer, although a subordinate, is *entirely independent*," on the other hand. As to the duties performed by the subordinate, merely in virtue of authority delegated by the chief, he says:

> "Mandamus evidently will not lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do."
>
> *Butterworth* v. *Hoe*, 112 U. S. 50, 54.

Neither will it lie to compel him to undo a thing which his superior has empowered him to do.

The absurdity of attempting to exercise judicial constraint upon an inferior officer, when acting purely in virtue of authority delegated by his superior officer, is apparent from the fact that the superior may thwart the judgment of the court or render it nugatory at any time by acting in person with reference to the particular matter in litigation.

Further authorities seem unnecessary. Nevertheless reference may be made to:

> *State of Georgia* v. *Stanton*, 6 Wall. 50, 77;
>
> *People ex rel Sutherland* v. *Governor*, 29 Mich. 320; 33 Am. Rep. 89, 95;
>
> *McFall* v. *Board of Education*, 101 Tex. 572; 110 S. W. 739;

and to the cases cited in the next point.

B.

THE SECRETARY OF WAR IS IN THIS CASE NOT SUBJECT TO COERCION BY MANDAMUS, BECAUSE NO DUTY HAS BEEN CAST UPON HIM BY LAW VIRTUTE OFFICII.

The writ of mandamus does not properly extend to coercing administrative action, merely because a relator is, in justice, entitled to the doing of the act; it must also be made to appear that the act thus to be coerced is enjoined by law, and *enjoined upon the defendant*. It is not enough that an administrative duty, which may remain unperformed, is plain. Mandamus will not lie unless the duty is *explicitly and peremptorily* enjoined by law upon the officer who is the defendant in the cause. (*Olsen* v. *Herstein*, 32 Phil. Rep. 520, 531.)

1. It seems evident that these petitions were filed against Mr. Baker because it was Mr. Baker who performed the following acts: In the exercise of his discretion, he concluded, upon reviewing both of these elimination proceedings, that the cases of the two relators had been justly disposed of by the various Army boards; he endorsed his approval on the papers; and he signed, or caused the former Assistant Secretary, Mr. Williams, to sign the respective orders of discharge and retirement. But these facts afforded no reason for asking or granting mandamus against Mr. Baker or his successor; for the acts to be performed are not acts which the law requires *virtute officii* of a Secretary of War.

The revocation or vacating of orders of discharge and of retirement is, of course, the duty (if duty there be) of him upon whom the law casts the re-

sponsibility of ordering discharges and retirements. This responsibility is one which the law casts exclusively upon the President of the United States.

United States v. *Corson*, 114 U. S. 619, 620, 621.
23 Ops. Atty. Gen. 30.
R. S. 1243–1253.

The Secretary of War has not the slightest power *virtute officii* in the matter of ordering discharges and retirements, or of granting reinstatements, in cases where that is possible. It is only when he wields the presidential power by a valid delegation thereof that any such orders of his are effective.

The Secretary of War is not the proper party defendant in this case for the same reason that caused the Court of Appeals in *McGowan* v. *Moody* (22 App. D. C. 148, 164) to hold that the Secretary of the Navy was not the proper party defendant. The present case involves the power of the Secretary of War to control the status of military officers; the McGowan case involved the power of the Secretary of the Navy to control the status of naval prisoners. The court said:

> "The officers of the Navy are not his" (the Secretary's) "agents. They, like the Secretary himself, are the agents and representatives of the President. * * * Any authority which the Secretary may exercise over them is solely as the representative of the President, in his name, and as the organ of his will. *United States ex rel. Brown* v. *Root*, 18 App. D. C. 239, 242. The power to relieve the prisoner or to produce him in obedience to the writ is

in the President and not in the Secretary of the Navy."

McGowan v. *Moody*, 22 App. D. C. 148, 164.

Plaintiffs in error complain in substance that *the President neglected* his alleged duty of personally reviewing the proceedings and that *the honest and faithful board neglected* their duty of affording opportunity for a hearing before them. But there is no suggestion of neglect of any duty imposed upon the Secretary of War, whose only function arose because of delegation of the President's authority and consisted in exercising his judgment and discretion as to the sufficiency of the showing made against the plaintiffs in error and others similarly placed. It is not contended that his judgment and discretion are reviewable on mandamus (*U. S.* v. *Lamont*, 155 U. S. 303).

The situation, in one aspect, resembles that in *Ex parte Rowland*, 104 U. S. 604, 617, in which Chief Justice Waite said:

> "Their obligations" (the obligations of the county commissioners) "in this respect end where those of another public officer begin. They *cannot be required* by mandamus *to compel another* public *officer to do his duty*, if, without their intervention, the moving party can himself accomplish the same result." * * * (Mandamus) "only lies when there is practically no other remedy. As a necessary consequence, the *writ must issue directly against him whose duty it is* to do the thing which the parties seek to have done; for, as was said in *Reg.* v. *Mayor of Derby* (2 Salk. 436), 'it is absurd

that the writ should be directed to one person to command another.'"

Ex parte Rowland, 104 U. S. 604, 617.

That judicial control may only be exercised over officers in respect of a duty for which they are directly responsible *virtute officii* was also recognized by this court in *Fitts* v. *McGhee* and in *Ex parte Young*, from which, the following extracts are quoted:

"Neither of the * * * officers named held any special relation to the particular statute, alleged to be unconstitutional. They were not *expressly* directed to see to its enforcement"

Fitts v. *McGhee*, 172 U. S. 516, 530.

"In making an officer * * * a party defendant in a suit to enjoin the enforcement of an act, * * * it is plain that such officer must have some connection with the enforcement of the act. * * * It has not, however, been held that it was necessary that such duty" (of the party defendant) "should be declared in the same act which is to be enforced. * * * The fact that the * * * officer *by virtue of his office* has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law or is specially created by the act itself, is not material, so long as it exists"

Ex parte Young, 209 U. S. 123, 157.

Other decisions to the same effect are:

Missouri ex rel Laclede Gas L. Co. v. *Murphy*, 170 U. S. 78, 96, 99.

Supervisors v. *U. S.*, 18 Wall. 71, 78.

German Sec. Bank v. *Coulter*, 112 Ky. 577; 66 S. W. 425, 426.

Farrell v. *King*, 41 Conn. 448, 451, 453.

Holtzclaw v. *Riley*, 113 Ga. 1023; 39 S. E. 425.

U. S. ex rel Strasburger v. *Commissioners*, 5 Mackey 389.

In any view of the matter, it is therefore impossible to say (paraphrasing the language used in *Reeside* v. *Walker*, 11 How. 272, 289,) that the Secretary of War *himself* has refused to act.

2. But plaintiffs in error contend that even if the Secretary of War is not charged with any duty by law of reinstating military officers eliminated through invalid orders of discharge or retirement, he is compellable through mandamus to revoke the orders in question, because they were his own orders and thus he is compellable to order their reinstatement.

The argument is a complete *non sequitur*. The orders of discharge and retirement (whether valid or invalid) were presidential orders and a subordinate of the President can not be compelled to revoke them. *Garfield* v. *Goldsby*, 211 U. S. 249, relied on by plaintiffs in error, is in no respect inconsistent with our contentions. It is true that there the Secretary of the Interior was required to cure wrongful acts of his, which were in excess of the authority conferred upon him by law, but the acts necessary to cure them were purely ministerial acts, entirely within the scope of the duties and cast upon him *virtute officii* by statute. The statutes, which named the Secretary of the Interior, expressly and specifically enjoined upon him

the duties, which, if performed, would have rendered mandamus superfluous, were:

Act of June 28, 1898, sec. 12; 30 Stat. 498.
Act of March 3, 1901; 31 Stat. 1077.
Act of July 1, 1902; 32 Stat. 641, 646.

C.

UPON MANDAMUS, DOUBTS CONCERNING THE INTERPRETATION OF STATUTES MUST BE RESOLVED AGAINST RELATORS.

Hall v. *Payne*, 254 U. S. 343, 347.
Redfield v. *Windom*, 137 U. S. 636, 643.
Ex parte Muir, 254 U. S. 522, 534.
Ness v. *Fisher*, 223 U. S. 683, 692.
Dunlap v. *Black*, 128 U. S. 40, 48.
Decature v. *Paulding*, 14 Pet. 497.
Miller v. *Raum*, 135 U. S. 200, 204.

In order to succeed, plaintiffs in error must show that there is *no reasonable basis* for the interpretation of section 24b adopted by the War Department. This is clearly hopeless. Even were the case not one of mandamus, the departmental interpretation would be entitled to great weight. (Authorities, supra, p. 103.)

D.

RELATORS' OFFICES HAVE EXPIRED BY LAPSE OF TIME SINCE THESE ACTIONS WERE INSTITUTED, IRRESPECTIVE OF THE MERIT OF THE CAUSES OF ACTION AT THE TIMES WHEN THE PETITIONS WERE FILED.

No offices, therefore, exist at present to which these plaintiffs in error could be restored. It follows, of course, that writs of mandamus can not be granted.

Heitmuller v. *Stokes*, 256 U. S. 359.

Payne v. *Hearst*, 50 App. D. C. 162; 269 Fed. 678.

Norris v. *U. S.*, Opin. Nov. 7, 1921, by Mr. Justice Day.

Both of the plaintiffs in error, at the time of their respective orders of discharge and of retirement, were colonels of Infantry in virtue of recess appointments. The petitions allege with meticulous care presidential nomination and senatorial confirmation, in respect of relators' other appointments, but not in respect of the appointments in question, which are alleged to have taken place July 1, 1920, as to Col. French (Rec. p. 2) and July 20, 1920, as to Col. Creary (Rec. p. 2).

In July, 1920, the Senate of the United States was not in session and its next session expired March 4, 1921; both of which facts are known judicially to this court. Each of the plaintiffs in error failed of confirmation and appointment thereafter. Confirmations, it is believed, are matters that are taken judicial notice of. Moreover, want of confirmation, at least up to the time of filing the petitions, is clearly implied therein. Allegations in the nature of pleas of *puis darrein continuance*, showing want of confirmation before March 5, 1921, were tendered by defendant and refused. (French rec. pp. 32, 33; Creary rec. p. 33; *Thompson* v. *United States*, 103 U. S. 480, 483).

In this situation, the status of plaintiffs in error is regulated by the Constitution (art. 2, sec. 2, clause 3) and by section 51 of the Army reorganization act (41 Stat. 759, 786, 787). The latter reads as follows:

> "Whenever prior to December 31, 1920, any person shall be nominated to the Senate for appointment to fill any office in the Regular Army provided for by this act, the President alone is authorized to appoint such person

> temporarily in the United States Army in the grade pertaining to such Regular Army office, to have rank and pay from the same dates as if such appointment were in the Regular Army. *Such temporary appointment shall terminate* upon acceptance, after confirmation, of the corresponding office in the Regular Army, or *on March 4, 1921, if then still unconfirmed.*"

As there is no allegation of confirmation by the Senate of either plaintiff in error in the office to which, he seeks restoration by mandamus, or of appointment in virtue thereof, it follows necessarily that the commission of each plaintiff in error in respect of such office expired March 4, 1921, if not before; this being the rule declared both by the Constitution and by section 51 of the reorganization act, supra.

Were plaintiffs in error to argue that upon failure of confirmation, they revert to their preceding grades in the permanent military establishment, to wit, Col. French to the grade of major (rec. p. 2) and Col. Creary to the grade of lieutenant colonel (rec. p. 2), and could be restored to such preceding grades by mandamus, the answer would be that the right to revert in these circumstances involves a close and well-balanced question, and can not, therefore, be recognized in an action of mandamus. There is, of course, no question of reverting to any of the abolished offices in the temporary forces (41 Stat. 786; 40 Stat. 82).

The right to revert has been asserted by Attorney General Wickersham (29 Ops. Atty. Gen. 598), and denied by Attorney General Garland (Opinion Apr. 27, 1885, to the Secretary of War) and by President

Fillmore's ruling of September 24, 1852. The latter, which was addressed to the Secretary of the Navy reads, in part, as follows:

> "It appears to me on looking at this subject that the promotion of a naval or military officer from one grade to another, and the acceptance by him of the higher grade, *necessarily vacates* his office in the lower, as the two positions, implying rank and command on the one side, and subordination on the other, are incompatible with each other. As the commissions which promote these officers to the higher rank expired at the close of the last session of Congress, the inevitable consequence would seem to be that these officers are out of commission. They lost their first rank on promotion to and acceptance of the higher, and the commissions to the higher having expired, they are no longer officers of the Navy."

The doubt as to what the correct rule is will, of course, not be solved in favor of relators in an action of mandamus (*Hall* v. *Payne*, 254 U. S. 343, 347, and cases cited supra at p. 126).

IV.

The judgments of the Court of Appeals herein should be affirmed with costs.

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